

The New McCarthyism in Europe?
Freedom of Expression v Counter Terrorism Measures
“Apologie du Terrorisme” and/or “Incitement to
Terrorism”

Candidate number: 80014

Supervisor: Attorney at Law Frode Elgesem

Semester: Spring

Date: 02.06. 2006

Number of words: 18984

Table of Contents

| | | |
|----------|--|-----------|
| 1 | Introduction | 1 |
| 1.1 | Background..... | 1 |
| 1.2 | Objectives..... | 1 |
| 2 | Legal framework: ICCPR and ECHR | 3 |
| 2.1 | The right to freedom of expression under ICCPR and ECHR..... | 3 |
| 2.2 | The Framework of restrictions under the ICCPR; rules regarding permissible restrictions..... | 3 |
| 2.2.1 | Test I – “provided by law” | 4 |
| 2.2.2 | Test II - necessary for a legitimate purpose and proportional to the aim pursued | 5 |
| 2.2.3 | Human Rights Committee practice | 6 |
| 2.2.4 | Article 20 ICCPR | 8 |
| 2.3 | The framework of restrictions under the ECHR: rules regarding permissible restrictions..... | 10 |
| 2.3.1 | The notions of “national security and public order” | 11 |
| 2.3.2 | Test I – “prescribed by law” | 11 |
| 2.3.3 | Test II – “the interference must pursue a legitimate aim” | 14 |
| 2.3.4 | Test III – “restrictions must be necessary in a democratic society” | 14 |
| 2.3.5 | Freedom of expression v speech which incites to violence/terrorism..... | 17 |
| 2.4 | Analysis and conclusions | 24 |
| 3 | New offences of terrorism in international law | 29 |
| 3.1 | “Apologie du terrorisme” and “incitement to terrorism”..... | 29 |
| 3.2 | European Convention on the Prevention on Terrorism No. 196 | 29 |
| 3.2.1 | The emergence of new offences of terrorism..... | 29 |
| 3.2.2 | Article 5; “public provocation to commit a terrorist offence” | 30 |
| 3.3 | Security Council Resolution 1624 | 33 |
| 3.4 | Analysis and conclusions | 35 |
| 4 | Counter Terrorism measures in two case studies | 38 |
| 4.1 | Novel crimes..... | 38 |
| 4.2 | Counter terrorism in Germany..... | 38 |
| 4.2.1 | The Immigration Act (Aufenthaltsgesetz)..... | 38 |
| 4.2.2 | Relevant domestic jurisprudence | 41 |
| 4.3 | Counter terrorism in United Kingdom | 41 |
| 4.3.1 | UK instruments in the fight against terrorism: The Terrorism Act 2006..... | 42 |
| 4.3.2 | “The Home Office List of Unacceptable Behaviors” | 45 |
| 4.3.3 | Relevant domestic jurisprudence | 47 |
| 4.4 | Concluding remarks..... | 49 |
| 5 | Summary and final remarks | 50 |

Abbreviations

| | |
|----------|---|
| CAT | Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment |
| CERD | Convention on the Elimination of All Forms of Racial Discrimination |
| CODEXTER | The Committee of Experts on Terrorism |
| COE | Council of Europe |
| COM | Committee of Ministers |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| ECPP | European Convention on the Prevention of Terrorism No. 196 |
| EP | European Parliament |
| ER | Explanatory Report of the ECPT |
| GA | General Assembly |
| GMT | Legal Group on International Action against Terrorism |
| HRC | Human Rights Committee |
| HS | UK Home Secretary |
| ICCPR | International Covenant on Civil and Political Rights |
| ICTR | International Criminal Tribunal for Rwanda |
| LUB | Tackling Terrorism - The UK List of Unacceptable Behaviors |
| PKK | Kurdistan Worker's Party (Partiya Karkerên Kurdistan) |
| SIAC | Special Immigration Appeal Commission |
| SC | Security Council |

| | |
|----------|---------------------------------------|
| SCR 1624 | Security Council Resolution 1624 |
| SP | State Parties |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |

1 Introduction

1.1 Background

As a direct result of the murderous terrorist attacks executed on American, Spanish and British soil, numerous European countries felt that the only way to match the threat that terrorism poses to their national security and democracy is to re-evaluate their legislative, judicial and investigative policies in order to effectively prevent and fight terrorism.

It did not take long until lawmakers all over Europe realized that the terrorism threat is fuelled by expression which incites to terrorism and propaganda for terrorism. Thus a new general trend emerged in domestic and international legislations i.e. prohibition of expression which indirectly incites to terrorism.

To this end, national and international legislators designed the new offences of “apologie du terrorisme” and/or “incitement to terrorism”¹ to fill perceived gaps in criminal law by squelching forms of expression which are regarded as threats to international and national security.

1.2 Objectives

The main objective of this thesis is to determine whether the offences of “apologie du terrorisme” and/or “incitement to terrorism” as enshrined in counter terrorism measures at domestic and international level respect the requirements set out in Articles 10 of the ECHR and 19, 20 of the ICCPR and whether the ECtHR and the HRC jurisprudence allows for the introduction of such offences in domestic laws.

Chapter II moves on to examine the international legal frameworks which protect the right to freedom of expression and will lay out the general rules regarding permissible restriction on freedom of expression, on grounds of national security and public order. The chapter dwells on relevant jurisprudence of both ECtHR and HRC.

¹ unless otherwise provided the terminology of “incitement to terrorism” is construed as indirect incitement to terrorism

Chapter III describes and analyzes the provisions of “apologie du terrorisme” and “incitement to terrorism” as incorporated in the ECPT 196 and in the SCR 1624 and the compliance of such offences with the rules enshrined in the ECHR, ICCPR. The remainder of the chapter will determine whether the international offences of “apologie du terrorisme” and/or “incitement to terrorism” are defined clearly enough to allow States to implement them at domestic level in accordance with the requirements set out in Article 10 of the ECHR and Articles 19 and 20 of the ICCPR regarding the right to freedom of expression.

Chapter IV presents two case studies of countries that introduced new legislation, based on the standards proposed by the regional and international bodies, which penalize “apologie du terrorisme” and/or “incitement to terrorism”. It will be argued that these provisions fail to define with precision the conducts prohibited and therefore are not in compliance with the requirements set in Articles 10 of the ECHR and 19 of the ICCPR.

Chapter V will provide a summary and some closing remarks regarding the achievement of this thesis.

2 Legal framework: ICCPR and ECHR

This chapter discusses the legal premises for imposing restrictions on the right to freedom of expression under Article 19 of ICCPR and contains an analysis of the HRC jurisprudence involving speech which threatens national security and which may be construed as to incite to violence and disorder. It also examines Article 20 of the ICCPR and focuses on analyzing the meaning of “propaganda for war” and “advocacy that constitutes incitement to violence”.

It explores the right to freedom of expression under Article 10 of the ECHR focusing on the jurisprudence of the ECtHR with particular emphasis on case law dealing with restrictions imposed on freedom of expression which attempt to curtail terrorist threats by prohibiting speech which incites to violence and terrorism.

2.1 The right to freedom of expression under ICCPR and ECHR

Freedom of expression is protected in Article 19 of the ICCPR and in Article 10 of the ECHR. Both Conventions provide that the right is not an absolute right, but it may be subject to restrictions as provided for in Articles 19(3) and 20 of the ICCPR and Article 10(2) of the ECHR.² ‘National security’/public order interests may demand in certain circumstances, such as the ones in the fight against terrorism, that the right to be restricted in order to preserve the existence of the state and the lives of its citizens. However, those restrictions must respect specific rules which will be examined in further detail below.

2.2 The Framework of restrictions under the ICCPR; rules regarding permissible restrictions

The main focus of this analysis is on the right to freedom of expression as guaranteed in Article 19 of the ICCPR, right which may be restricted on grounds of “national security” and “public order”. Although there is not much guidance concerning the possible distinctions between “national security” and “ordre public”, it is understood that “the protection of national security is taken to cover measures to prevent or respond to serious threats to the country as a whole such as incitement to overthrow the government.”³

² Annex I, Article 19, ICCPR

³ Nowak, Manfred, U.N. ICCPR: CCPR Commentary, 1993

Whilst Article 19(3) allows States to impose restrictions on the right to freedom of expression on national security grounds, these restrictions must strictly respect the following requirements as they are construed in the practice of the HRC.

2.2.1 Test I – “provided by law”

Although the right to freedom of opinion as enshrined in Article 19(1) cannot be restricted, the exercise of the right to freedom of expression and information guaranteed in paragraph 2 of Article 19 can be limited in certain conditions as stipulated in 19(3), but these restrictions “shall only be such as provided by law”.

The HRC has not made a clear judicial interpretation of the limitation provisions, but to cast some light over the principle of legality, one might note that the HRC mainly relies on the text of Article 19 and emphasizes that “[...] restrictions may not put in jeopardy the right itself” and that “they must respect certain requirements.”⁴

Furthermore, Article 19(3) will allow restrictions on freedom of expression when “provided by law” i.e. where the State concerned is able to show a legal basis for the restrictions adopted at domestic level. The State concerned must also demonstrate how the law applies to the circumstances of a particular case.⁵

The principle of legality was addressed by the HRC in *Toonen v Australia*, a case dealing with the right to privacy. The HCR had to clarify if the restrictions on the right to privacy as incorporated in the Australian legislation satisfied the criteria of “provided by law”. For this purposes the Committee reiterated its GC on article 17 where it addressed the test of “provided by law” interlinked with the concept of “arbitrariness” of the law. The Committee established here, that the “[...]concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be [...] reasonable in the particular circumstances”.⁶

In *Faurisson v France*⁷ the HRC argued that even though a law appears broad in scope, when applied compatibly to a particular case, it can not be excluded that the laws, decisions or measures, will satisfy the requirement of “provided by law.”⁸ I would point out though that,

⁴ General Comment 10, A/38/40 (1983)

⁵ *Faurisson v France*, 8/11/96

⁶ *Toonen v Australia*, 31/3/94

⁷ *ibid.* 6

⁸ *ibid.* 6

in several separate concurring opinions, six members of the Committee argued that the domestic law in question was “phrased in the widest language” while others argued that the domestic legislation clearly violates Article 19 as the law was too broad.⁹

In *Maroufidou v Sweden*, the author claimed that the decision taken by Swedish authorities to expel her on national security/terrorism grounds violated her rights under Article 13 of the ICCPR. Maroufidou alleged that the expulsion order was in breach with the requirement of “in accordance with law” as the State interpreted the law incorrectly. The Committee concluded that “the interpretation of domestic law is essentially a matter for the courts and authorities of the State...unless it is established that they have not interpreted and applied it in good faith or that it is evident that there has been an abuse of power.”¹⁰ The Committee found no violation under article 13, under the test of “in accordance with the law.”

2.2.2 Test II - necessary for a legitimate purpose and proportional to the aim pursued

Article 19(3) provides that restrictions imposed on freedom of expression must be necessary for a legitimate purpose thus States claiming that they impose restrictions on ground of “national security” must demonstrate the existence of a present threat to the nation as a whole. There must be a link between the expression at issue and the threat, the expression must either caused or contributed to that threat. Furthermore, the measures taken by states must be necessary to avert that threat and proportional to it.¹¹

To exemplify, in *Sohn v. Republic of Korea*, the author argued that his arrest and conviction for issuing statements of support for a strike, violated his right guaranteed by Article 19(2). The State party argued that the measures taken were “necessary” for the protection of national security and public order as labour activists do not hesitate to resume to extreme actions by using force and violence to reach their political aims. The Committee stressed “that the State Party failed to specify the exact nature of the threat” that the author’s exercise of freedom of expression posed and concluded that “none of the State’s arguments advanced by the State...suffice to render the restriction...compatible” with Article 19(3).¹²

In a similar vein, in *Pietraroia v Uruguay*, the HRC noted that the State party “has submitted no evidence” regarding the nature of the activities of which Rosario Pietraroia was accused.

⁹ Joseph, Sarah, (et al), *The ICCPR, Cases Materials and Commentary* pp. 555-557, 2004

¹⁰ *Anna Maroufidou v Sweden*, 9/4/81

¹¹ Evatt, Elisabeth, *The ICCPR and Political Rights: Freedom of Expression and State Security*, p. 88, 1999

¹² *Sohn v Republic of Korea*, 19/7/95

The HRC pointed that “bare information from the State party that the he was charged with subversive association and conspiracy to violate the Constitution, followed by preparatory acts thereto, is not in itself sufficient, without details of the alleged charges and copies of the court proceedings”. The Committee concluded thus that the measures taken against Rosario Pietraroia were not justified on any of the grounds mentioned in article 19 (3) of the Covenant.

In certain cases, where restrictions have been deemed “necessary for a legitimate purpose”, the HRC goes on to determine whether the restrictions were proportional to the legitimate aim pursued i.e. whether the measures adopted by states were necessary and proportional to avert that specific threat. To illustrate, in *Toonen v Australia*, the HRC determined that the interference of the authorities with the personal privacy of individuals for the protection of “public morals” must represent a “proportional response to the perceived threat to the moral standards of Tasmanian society.” Furthermore, the Committee mentioned here the “requirement of reasonableness” which is construed to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.¹³

A similar approach was taken in *Pietraroia v Uruguay*¹⁴ where the HRC emphasized in relation to Article 25, (which guarantees the enjoyment of political rights), that restrictions shall not be imposed solely based on the political opinion of the individual concerned.¹⁵ The HRC pointed out that in such cases the “principle of proportionality” would require that restrictions which impose “[...] harsh penalties on all political rights must be specifically justified”.¹⁶

2.2.3 Human Rights Committee practice

A case concerning the issues of national security and restriction on freedom of expression is *Kim v. Republic of Korea*¹⁷ where the author of the communication was convicted under Korean National Security Law for “praising or encouraging” activities of anti-state organizations.

The Committee had to determine whether the author’s freedom of expression was restricted in conformity with the requirement spelled out in Article 19, paragraph 3. The Committee noted

¹³ *ibid.* 12, §8.3, §8.5

¹⁴ *Pietraroia Zapala v Uruguay*, 27/3/81

¹⁵ *ibid.* 14, §16

¹⁶ *ibid.* 14

¹⁷ *Kim v Republic of Korea*, 3/11/98

that the restriction had its basis in the Nation Security Law thus it complied with the principle of ‘provided by law’. The Committee then examined whether the restriction on freedom of expression was necessary for one of the purposes set out in article 19, paragraph 3.

When assessing the necessity of the restriction for the purpose of national security the HRC specified that “careful scrutiny” must be applied as the domestic offences under the National Security Law were formulated in “broad and unspecific terms.” The HRC observed here that Kim “[...] was convicted by the courts on the basis of a finding that he had done this with the intention of siding with the activities of the DPRK” and that the criminal liability of the author was established by the Korean Supreme Court solely on the basis that “[...] **mere** knowledge that an activity might benefit the enemy was sufficient to establish guilt”¹⁸.

The Committee rejected this argument and considered that the domestic courts did not analyze the content of the speech made by the applicant or whether the documents in question could have had an impact on the audiences or readers in such a way to threaten public security.¹⁹ Following this reasoning the HRC found that the State party failed to specify the precise nature of the threat posed by the author's exercise of freedom of expression and failed to justify why the prosecution and conviction of Mr. Kim were necessary for national security reasons. Thus it concluded that there was a violation of article 19(3).

In the present case the HRC found a violation of Article 19(3) mainly based on the finding that the Supreme Court of Korea failed to apply a sound interpretation test regarding the guilt of the applicant at the commission of the imputed offences.

The issue of national security as a basis for limiting freedom of expression was considered in *Park v Republic of Korea* where the State party argued that the limitation was imposed in conformity with Article 7 of its “National Security Law”.²⁰

The author's conviction was based on his membership and participation in the activities of the Young Koreans United (YKU) which promoted the unification between North and South Korea. The organization was highly critical of the government of the Republic of Korea and of the US support for the government.²¹ The State party argued that “the author's activities as a member of YKU, an enemy benefiting organization that endorses the policies of the North Korean communists,

¹⁸ *ibid* 17

¹⁹ *ibid* 17, §12.5

²⁰ *Park v. Korea*, 5 July, 628/95

²¹ *ibid*. 20

constituted a threat to the preservation of the democratic system in the Republic of Korea”²² and to the country’s national security. The HRC rejected this view and considered that the State failed to specify the precise nature of the threat that the author’s speech posed to the Korean national security. The Committee found thus a violation of the right to freedom of expression.

In the case *Dergachev v Belarus*²³, the author of the communication was tried by a Belarus Court for carrying a poster which had inscribed the following: “Followers of the present regime! You have led the people to poverty for 5 years. Stop listening to lies. Join the struggle led by the Belarus People’s Front for you”²⁴. The State concerned argued that the inscription on the poster called for insurgency against the government and destruction of the constitutional order.²⁵ The Committee merely considered that the present inscription on the poster was “particular expression of political opinion” thus Belarus was found to breach Article 19(2) of the ICCPR.

The HRC plainly concluded that the expression in question falls within the ambits protected by Article 19 without performing any analysis of the expression in question. We note here a departure in the HRC method of interpretation from the one taken in *Kim v Korea*, where it concluded that the domestic courts failed to analyze the content of the author’s speech as whether it may threaten the national security.

In *Mukong v Cameroon*, the author claimed a violation under Article 19(3) following his arrest and persecution on account of his “advocacy of multiparty democracy and the expression of opinions inimical to the government”. The State concerned argued that this limitation imposed on the author’s freedom of expression was necessary on “national security/public order grounds. The HRC rejected the argument and concluded that legitimate objectives to safeguard and strengthen national unity can not be achieved by “attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights”.²⁶

2.2.4 Article 20 ICCPR

The following analysis deals with Article 20 of the ICCPR²⁷ which incorporates a set of provisions imposing mandatory limitations to the right to freedom of expression, considered to be in furtherance with the limitations set forth in Article 19(3). Accordingly, the HRC

²² *ibid.* 20, §8.2

²³ *Dergachev v. Belarus*, (2002)

²⁴ *ibid.* 23

²⁵ *ibid.* 23, §2.2

²⁶ *Mukong v Cameroon*, 21/7/94

²⁷ see Annex I, Article 20, ICCPR

stressed in GC 20 that the prohibitions required by Article 20 “[...] are fully compatible with the right to freedom of expression as contained in Article 19”²⁸

The HRC touched upon Article 20 in *J.R.T and W.G. v Canada* where the authors complained of violations under Article 19(1) and 19(2) as they were prohibited from using the telecommunication services. The State argued that the authors used the telecommunication services to disseminate anti-Semitic beliefs.²⁹ The HRC determined here that the “messages clearly constitute the advocacy of racial or religious hatred that Canada has an obligation to prohibit under Article 20(2)”.³⁰ The HRC concluded that the communication is incompatible with the provisions of the ICCPR, thus inadmissible.³¹

We note that HRC did not provide a clear definition for “propaganda for war” and did not clarify when expression amounts to “advocacy that constitutes incitement to violence”. The wording “hatred” is not legally defined³² either and this lack of definition made the adoption of Article 20 controversial as the drafters feared that States will feel encouraged to invoke Article 20 to impose prior censorship on all forms of expression and to suppress political dissent.³³

Although the meaning of “incitement to discrimination, hostility or violence” was addressed in GC No. 11 on Article 20, the HRC did not specify when advocacy becomes incitement to violence. The GC mainly establishes that the provisions enshrined in Article 20 shall be construed “[...] to extend to all forms of propaganda threatening or resulting in an act of aggression or breach of the peace contrary to the Charter of the United Nations while paragraph 2 is directed against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are external or internal to the state concerned”³⁴.

To summarize the GC on Article 20 specifies that “propaganda” must be “threatening” or “resulting” in a breach of the peace, but it does not clarify the circumstances when “propaganda” can be seen as a threat to the peace i.e. when the threshold of “threat” is reached. What the Committee noted though is that ‘propaganda and advocacy’ must be contrary to public policy in order to violate Article 20.

²⁸ GC No. 11(19), UN Doc., A/38/40, 1993

²⁹ *J.R.T and W.G. Party v Canada*, 6/4/83

³⁰ *ibid.* 29

³¹ *ibid.* 29, §12.30

³² Mc Goldrick, Dominic, *The HRC: Its Role in the Development of the ICCPR*, p.462, 1991

³³ *ibid.* 32

³⁴ *ibid.* 28

The Committee determined that “propaganda for war” refers to illegal wars and not to wars for self-defence, liberation and self-determination. I would stress here that at the drafting of GC 20, professor Tomuschat pointed out that “[...] the HRC must not appear as to urging the Kurds, Armenians or the people of the Sahara, for example, to take up arms.” The biggest fear of the HRC was that the text of the GC might be interpreted as to endorse violence and terrorism.³⁵ During the three years of debates regarding the GC on Article 20, the HRC never clarified whether Article 20 could potentially be applied to the propaganda promoted by fundamentalist “terrorists” or by “guerrilla fighters”.

Looking at GC No. 6 on the right to life we also observe that the HRC establishes a link between Article 6 and Article 20 by emphasizing that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence which cause arbitrary loss of life.³⁶ The HRC emphasized that there is a connection between the safeguarding of the right to life and prohibition of propaganda for war or incitement to violence. Based on this it may be inferred that “propaganda for war” and “incitement to violence” qualify as serious offences which can result in genocide and mass violence.

This appears to be the case if relying in a recent judgment delivered by the Supreme Court of Canada.³⁷ In the Mugesera case, the Canadian Court drew upon judgments from the ICTR³⁸ and established that hate speech and hate propaganda crimes are specific inchoate offences which “enter the realm of criminal law, namely if speech as a minimum openly advocates extreme violence.”³⁹

Despite the lack of substantive interpretations in the work of the HRC in relation to Article 20, one positive observation is that it refers to the immediacy of the obligation for States to comply with Article 19 and 20 and it demands “appropriate sanction”.⁴⁰

2.3 The framework of restrictions under the ECHR: rules regarding permissible restrictions⁴¹

The exercise of the right to freedom of expression may be subjected to ordinary limitations or restrictions for a variety of reasons such as national security, territorial integrity, public safety,

³⁵ *ibid.* 32

³⁶ GC No.6, 30/04/82

³⁷ Decision of the Supreme Court of Canada, SCC 40, 2005

³⁸ ICTR, SC Resolution 955/1994

³⁹ Rikhof, Joseph, Hate Speech and International Criminal Law, p.5, 2005

⁴⁰ *ibid.* 28

⁴¹ See Annex I, Article 10 of ECHR

public order, the prevention of disorder or crime, and the rights and freedoms of others. However the resort to limitations on these grounds is not an uncontrolled activity that States can dispose of after they own will.

The present section will determine the requirements set out by the ECHR that States Parties must comply with when interfering with the right to freedom of expression. Emphasis is placed on limitations on grounds of national security.

2.3.1 The notions of “national security and public order”

The ECHR provisions incorporate concepts such as: “national security”, “public order” and “prevention of crime”, all these notions representing valuable grounds which may impose limitations on the right to freedom of expression. Although the ECtHR did not provide a thorough interpretation of the notions of “national security” and “public order” one might elucidate the meaning of this terminology by looking at the Court’s relevant jurisprudence. Often, those concepts appear in the ECtHR practice in relation to cases involving issues such as “secret surveillance”, “discipline within the armed forces and civil service”⁴² and prevention of terrorism.

In *Klass and Others v Germany*, the concept of “national security” was construed as to imply the presence of an “imminent danger” which threatens the democratic order of a state and which was so grave as to challenge the “existence” of that state; it also encompassed the security of foreign military bases within the territory of a guest State.⁴³ “National security” refers as well to the proper operation of national military forces and to the protection of military secrets which may secure national defense⁴⁴ while the concept of “public order” is construed to refer to rules of internal order and military conduct within the State’s military forces.⁴⁵

2.3.2 Test I – “prescribed by law”

Analyzing the legality of the restrictions imposed by national security/public order rationales on the right to freedom of expression one must apply the three-part test employed by the ECtHR when assessing the legitimacy of the interference with the free expression.

⁴² Svensson McCarthy, Anna Lena, *The International Law of Human Rights and States of Exceptions*, Chapter 4, 1998

⁴³ *Klass and Others v Germany*, 6/09/78

⁴⁴ *Hadjianastassiou v Greece*, 2/08/84

⁴⁵ *Engel and Others v The Netherlands*, 8/06/76, the ECtHR stated “public order” refers to “the order that must prevail within the confines of a specific social group”

Although States may enjoy a certain margin of appreciation preserving national security by adopting restriction measures, those measures must meet the criteria of legality i.e. they must comply with the requirement of ‘prescribed by law’.⁴⁶ The Court elaborated in its practice specific principles of interpretation of the above requirement.

The Court noted that the word “law” is to be interpreted as covering not only written law but also unwritten law: “[...] the word ‘law’ in the expression ‘prescribed by law’ covers not only statute but also unwritten law.”⁴⁷ The Commission and the ECtHR established that “the interference in question must have some basis in domestic law”⁴⁸ e.g. in the case *Piermont v. France*⁴⁹ the ECtHR recognized that administrative measures such as ‘expulsion orders’ and ‘refusal of entry’ respect the criteria of ‘prescribed by law’.

In *Malone v The United Kingdom*, the Court stressed that the phrase “in accordance with the law” relates to the principle of “quality of the law”⁵⁰ which requires compliance with “the rule of law” i.e. “[...] there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded [...] especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident [...]”⁵¹ The Court concluded that the domestic law in question, implemented by executive discretion “does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities”. The ECtHR pointed that the law lacked “the minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society” thus it concluded that it breaches the principle of “in accordance with the law”.⁵²

In *Huvig v France*, a case concerning a violation of Article 8 as result of telephone tapping measures, the Court determined under the “quality of law” criteria that the domestic system of surveillance measures “does not afford adequate safeguards against various possible abuses” as it failed to specify the categories of people liable to have their telephones tapped by judicial order and to define the nature of the offences which may justify such an order. The ECtHR concluded that the “French law, written and unwritten, does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities” violating thus Article

⁴⁶ Soulier, Gerard(ed.), “Terrorism”, p. 15, 1992

⁴⁷ *Handyside v. UK*, 7/12/1976

⁴⁸ *Malone v. The United Kingdom*, 2/08/84 , *Silver and Others v. UK*, 25/03/85

⁴⁹ *Piermont v. France*, 27/4/95

⁵⁰ *ibid.* 48

⁵¹ *ibid.* 48, §66

⁵² *ibid.* 48

8.⁵³ The Court specified that it does not find necessary to continue the analysis under the other requirements enshrined in Article 8(2).⁵⁴

Two other requirements that are flowing from the expression “prescribed by law” are: the law must be adequately accessible and the individual must be able to understand the legal rules applicable to a given case. Secondly, a norm cannot be regarded as ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: “he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”⁵⁵ Those consequences need not be foreseeable with absolute certainty, experience shows this to be unattainable.⁵⁶ Moreover the ECtHR will accept that laws incorporate terms which are vague and whose interpretation and application are questions of practice.⁵⁷

However, in *Hashman and Harrup v UK*, the applicants alleged that a binding-order issued against them to “keep the peace and be of good behavior” was a violation of Article 10. The order stated that the applicants “blew a hunting horn and engaged in hallooing with the intention of disrupting the activities of the Portman Hunt.” They argued that the order constituted an interference with their rights under Article 10 as it did not respect the criteria of “prescribed by law” within the meaning of that provision.⁵⁸ The Court noted here that the interference with freedom of expression “[...] was not expressed to be a “sanction”, or punishment, for behaviour of a certain type, but rather an order, imposed on the applicants, not to breach the peace or behave *contra bonos mores* in the future.” Furthermore, the Court observed that the binding-over order “had purely prospective effect” and “it did not require a finding that there had been a breach of the peace”.

By taking into account that the order “lacked precision” the Court determined that the applicants could not estimate what behaviour was to be allowed or not. The Court found of violation of Article 10(2) under the criteria of “prescribed by law” and concluded that the Court is not required to consider the remainder of the issues under Article 10 of the Convention.⁵⁹

⁵³ *Huvig v France*, 24/04/90

⁵⁴ the same approach was taken in *Kruslin v France*, 24/04/90

⁵⁵ *Sunday Times v. United Kingdom*, 26/04/79

⁵⁶ *ibid.* 55

⁵⁷ *ibid.* 55

⁵⁸ *Hasman and Harrup v United Kingdom*, 25/11/99

⁵⁹ *ibid.* 58

2.3.3 Test II – “the interference must pursue a legitimate aim”

The list of legitimate aims enlisted in Article 10(2)⁶⁰ is an exhaustive list, not an illustrative list and as Mahoney and Early observed and “the purposes” of those aims “[...] are reasonably clear in what they mean and in what they cover”.⁶¹

When the Court is satisfied that the interference was prescribed by law the ECtHR will go on to determine whether the restrictions imposed on the right to freedom of expression are grounded on one of the specified legitimate aims. The issue of national security may qualify as such a legitimate aim in the fight against terrorism and the counter terrorism measures adopted by States proscribing terrorism and terrorist activities are recognized by the ECtHR as valuable aims pursued for the preservation on national security.⁶²

2.3.4 Test III – “restrictions must be necessary in a democratic society”

The ECtHR explored the meaning of the term “necessary in a democratic society” in the *Handyside v United Kingdom* case where it established that the wording ‘necessary’ imposes less strict justifications than other terms used in the Convention, but requires higher standard of justification than terms such as: “reasonable” and “desirable”.⁶³ The ECtHR established here that the adjective “necessary”, within the meaning of Article 10 (2) is not synonymous with the wording “indispensable” in Article 2 and Article 6 of the ECHR and the words “absolutely necessary” and “strictly necessary” as required in Article 15.⁶⁴

The Court emphasised that: “the adjective necessary, within the meaning of Article 10(2) implies the existence of a pressing social need”.⁶⁵ In assessing whether the restriction is ‘necessary’ the ECtHR will generally refer to the wording “duties and responsibilities” of those who exercise the freedom of expression.⁶⁶

The role of the Court is to establish whether national authorities were justified when imposing a restriction. To this end “[...] the Court’s task, in exercising its supervisory jurisdiction, is not to take the place of competent national authorities but rather to review, under Article 10 the decisions they delivered

⁶⁰ see Annex I, Article 10 of ECHR

⁶¹ Mahoney, Paul, Lawrence, Early, *Freedom of Expression and National Security: Judicial and Policy Approaches Under the European Convention of Human Rights and Other Council of Europe Instruments*, p.115, 1999

⁶² *Handyside v UK*, 7/12/76, §48

⁶³ Loukaides G., Loukis, *Essays on the Developing Law of Human Rights*, p. 190

⁶⁴ *Handyside v UK*, 7/12/76, §48

⁶⁵ *ibid.* 62

⁶⁶ van Dijk, P.(ed)*Theory and Practice of the ECHR*; p. 571, 1998

pursuant to their power of appreciation.”⁶⁷ Although the Court establishes that States have “a power of appreciation”, States must exercise their discretion “reasonably, carefully and in good faith.”⁶⁸

Based on how States use their margin of discretion, the Court will determine whether the restriction, penalty or condition was proportionate to the legitimate aim pursued and whether the reasons invoked by domestic authorities when imposing restrictions were “relevant and sufficient”.⁶⁹ The ECtHR appears to employ a “sliding scale of protection”⁷⁰ i.e. the highest level of protection is received by political speech and political comment by the press, while at the opposite end of the scale we find inter alia religious expression, artistic expression and commercial speech.⁷¹

The scope of the margin of appreciation may be “broad and sometimes narrow depending on the nature of the rights in issue, or in the balancing of competing rights.”⁷² Thus in *Otto Preminger Institute v Austria*, where the right to freedom of expression of the applicant was weighed against the right to freedom of religion of religious majorities, the ECtHR established that “the national authorities did not overstep their margin of appreciation as they were better placed than the international judge” to assess the need for an interference measure at a given time and in the light of local circumstances.⁷³ The Court reached this conclusion based on the finding that the domestic measures were necessary to ensure religious peace in the region and to protect the “overwhelming majority” of Roman Catholics from feeling as object of attacks on grounds of their religious beliefs.⁷⁴

In several cases, the ECtHR had decided that the rationale of national security/public order affords States a wide margin of appreciation, although the Court emphasized its empowerment to give a final ruling on whether a restriction imposed on the Convention’s rights is necessary or not.

To illustrate, in *Klass and Others v. Germany*, the Court recognised that while States may enjoy certain discretion when adopting measures to combat terrorism this discretion is not

⁶⁷ see *Handyside v UK*

⁶⁸ *ibid.* 67

⁶⁹ *ibid.* 61, see *Mahoney and Early*

⁷⁰ *ibid.* 70

⁷¹ *ibid.* 70

⁷² Ovey, Clare, *European Convention on Human Rights*, p. 212, 2002

⁷³ *Otto Preminger Institute v Austria*, 20/09/74

⁷⁴ *ibid.* 72

unfettered as “[...] States do not enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance”, the Court, [...] affirms that ... States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate.” Moreover, the Court established that “an exception to a right guaranteed” by the Convention must be “narrowly interpreted”.⁷⁵

However, in this particular case, when deciding whether the measures “were necessary in a democratic society” the Court noted firstly that the “domestic legislator enjoys a certain discretion” when deciding how the surveillance measures are implemented in practice and emphasized that it “[...] must assume that in the democratic society of the Federal Republic of Germany the relevant authorities are properly applying the legislation in issue”.

The Court stressed that “some compromise between requirements for defending democratic society is inherent in the system of the Convention”. This meant in the Court’s view “that a balance must be sought between the exercise by the individual of the right guaranteed to him under paragraph 1 of Article 8 and the necessity under paragraph 2 of Article 8 to impose secret surveillance for the protection of the democratic society as a whole”⁷⁶. No violation was found under Article 8.

Similar reasoning is found in *Murray v UK*, a case brought to the Court under Article 5 regarding the liberty and security of person. As in the *Klass* case, the ECtHR stated that it is “prepared to attach some credence to the respondent Government that it possessed reliable but confidential information” that the applicant was involved in terrorist activities. The Court added though that the State “have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence”.⁷⁷

A similar stance is taken in *Leander v Sweden*, where the applicant alleged a violation of his right to private life, as the State prevented him to work in the civil service, on the basis that he was considered a risk to security. The ECtHR determined that “the state should enjoy a wide margin of appreciation, both in assessing the existence of a pressing social need and in choosing the means for achieving the legitimate aim of protecting national security.”⁷⁸

In *Hadjianastassiou v Greece*, the applicant, a military officer, alleged the violation of his right to freedom of expression as he was convicted for disclosing “general information” which military interests required to be kept secret. The Court concluded here that domestic military

⁷⁵ *Klass and Others v Germany*

⁷⁶ *ibid.* 45, *Engel and Others v the Netherlands*, §§38,50

⁷⁷ *Murray Family v UK*, 24/10/94

⁷⁸ *Leander v Sweden*, 26/03/87

courts “did not overstep the limits of the margin of appreciation which is to be left to the domestic authorities in matters of national security” and found no violation of Article 10.⁷⁹

2.3.5 Freedom of expression v speech which incites to violence/terrorism

This analysis will concentrate on the ECtHR jurisprudence particularly with regard to speech regarded as “incitement to terrorism” and “incitement to violence” in order to review the criteria that the ECtHR employs when deciding which speech shall be prohibited and which shall be not. The findings will be exploited in Chapter III of the thesis in order to assess whether the ECtHR jurisprudence can sustain the implementation of new counter terrorism offences such as: “indirect incitement to terrorism” and/or “apologie du terrorisme”.

The first case of restriction on freedom of expression as imposed by terrorism legislation was *Zana v. Turkey*, case in which the applicant was sentenced by the Diyarbakir Security Court to twelve months’ imprisonment for having “defended an act punishable by law as a serious crime” and “endangering public safety”.⁸⁰ The applicant was convicted for making the following statement to the written media: “I support the PKK national liberation movement; on the other hand, I am not in favor of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake ...”⁸¹

The ECtHR established that the restriction on freedom of expression was prescribed by law and went on to establish the legitimacy of the aims pursued. For the purposes of this test the ECtHR depicted the situation in Southeast Turkey and agreed that “serious disturbances were raging in south-east Turkey”⁸² at the time the speech was made by the applicant. It pointed out that the applicant’s speech can be interpreted as support for the PKK and its activities by corroborating the content of the statement in question with the murdering of civilians committed by PKK militants around the same time when the speech was delivered.

Furthermore the ECtHR noted that the statement was coming from “a political figure well known in the region and could have an impact such as to justify the national authorities’ taking a measure designed to maintain national security and public safety”⁸³ thus Court found that the interference pursued legitimate aims under Article 10, paragraph 2.

⁷⁹ *Hadjianastassiou v Greece*

⁸⁰ *Zana v. Turkey*, 25/11/97

⁸¹ *ibid.* 80, §48

⁸² *ibid.* 80, §49

⁸³ *ibid.* 80

Regarding the “necessity of the interference” the Court went on to establish whether Mr Zana’s conviction and sentence answered a “pressing social need” and whether they were “proportionate to the legitimate aims pursued”.

The Court analyzed the content of the remarks made by the applicant and concluded that the speech contained “contradictory and ambiguous terms”. The Court established a link between the “speech” given by the applicant and the situation prevailing in south-east of Turkey i.e. “murderous attacks on civilians and extreme tension”⁸⁴. The Court concluded thus that the interview given by the applicant and published in a major national daily newspaper had to be regarded as likely to exacerbate an already explosive situation in that region.⁸⁵ Consequently the Court found no breach of Article 10 of the ECHR.

The Court applied the following model of analysis: who was the author of the speech (the mayor of an important city); the content of the speech (difficult to grasp and contained ambiguous and contradictory meanings that had the potential to trigger “corrupting effects”⁸⁶ on the public); the context of the speech (delivered at a time when the PKK was murdering civilians in Turkish territory); and finally the recipient of the message (the majority of the population in the region). All these aspects were collectively considered and in the light of the findings the ECtHR decided that there was no breach of Article 10. This model of analysis is consistently applied by the Court in all subsequent cases dealt with below.

The ECtHR dealt with speech that incites to acts which may destabilize the security of the State in *Gerger v. Turkey*.⁸⁷ The expression in question was a speech given by the applicant in a ceremony which commemorated people who had taken part in terrorism activities.⁸⁸ The Government considered that the author intended to incite citizens of Kurdish origin to engage in armed combat against the State and to support separatist violence and argued that the applicant glorified acts of terrorism and encouraged for Kurdish terrorism, thus violating the “Prevention on Terrorism Act”.⁸⁹

Under the test of “prescribed by law” the Court plainly pointed out that it will adopt the Commission’s view that the “Turkish Prevention on Terrorism Act” respects the

⁸⁴ *ibid.* 80, §58

⁸⁵ *ibid.* 65, §61

⁸⁶ Harel, Alon, *The regulation of Speech: A Normative Investigation of Criminal Law Prohibitions on Speech*, p. 275, 2000

⁸⁷ *Gerger v. Turkey*,

⁸⁸ *ibid.* 87

⁸⁹ *ibid.* 87, §36

foreseeability criteria inherent in the notion of “law”, although the applicant argued that the domestic provisions are vague.⁹⁰

When establishing whether the domestic measures “pursued a legitimate aim”, the ECtHR stressed that it must take into account “the sensitivity of the security situation in south-east Turkey and to the need for the authorities to be alert to acts capable of fuelling additional violence”. Thus it concluded that the measures taken against the applicant “have been in furtherance of certain of the aims mentioned by the Government, namely the protection of national security and territorial integrity and the prevention of disorder and crime.”⁹¹

The ECtHR moved on to determine whether the interference was justified in the light of the case as a whole, “proportionate to the legitimate aims pursued” and whether the reasons invoked by the national authorities to justify it are “relevant and sufficient.”⁹²

When determining whether the “expression” in question incited to violence and terrorism, the Court observed that the applicant’s message was read out only to a small group of people which considerably restricted its potential impact on “national security”, public “order” or “territorial integrity” and also analyzed the content of the applicant’s speech by saying that it had “marxist undertones” and contained words such as “resistance”, “struggle” and “liberation”.⁹³

While the Government construed the present speech as condoning PKK activities, the Court argued that although the speech incorporated harsh criticism of the Turkish State, the message did not condone the PKK’s agenda. Thus the Court found a violation of Article 10.

Although this judgment is in line with the protection that the Court affords to political speech i.e. that “there is little scope under Article 10 (2) of the Convention for restrictions on political speech or on debate on matters of public interest”, several concurring judges suggest that the test applied by the ECtHR could be improved by introducing a slightly modified model of analysis, but which may prove more accurate when dealing with speech inciting to terrorism or violence.

⁹⁰ *ibid.* 87, §§36,38

⁹¹ *ibid.* 87, §42

⁹² *ibid.* 87, §46

⁹³ *ibid.* 87

Accordingly, the concurring judges show that the Court should ⁹⁴ “[...] focus less on the inflammatory nature of the words employed and more on the different elements of the contextual setting in which the speech was uttered. Was the language intended to inflame or incite to violence? Was there a real and genuine risk that it might actually do so?”⁹⁵

In a similar vein, in a separate concurring opinion, Judge Bonello argued that the approach taken by the Court is in need of change, as the approach in cases involving incitement to violence or terrorism does not constitute a reliable yardstick. He proposed that the Court should consider speech as incitement only when the incitement creates a “clear and present danger”. Moreover he pointed out that states shall not “[...] forbid or proscribe advocacy of the use of force except when such advocacy is directed to inciting or producing imminent lawlessness and is likely to incite or produce such action. It is a question of proximity and degree”.⁹⁶

Judge Bonello proposed that when assessing the element of clear and present danger the ECtHR must show “either that immediate serious violence was expected or was advocated, or that the past conduct of the applicant furnished reason to believe that his advocacy of violence would produce immediate and grievous action. [...]”. He argued that speech can not be considered dangerous “unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion [...]”⁹⁷

Another case dealt with by the ECtHR is *Karatas v Turkey*⁹⁸ where the applicant, a writer, was convicted for glorification of insurrectionary movements and for separatist propaganda.

When assessing the “necessity of the interference”, the Court analyzed the content of the poems in question where the author used “pathos and metaphors” calling for self-sacrifice for “Kurdistan” and included “particularly aggressive passages directed at Turkish authorities.” The Court emphasized that “taken literally, the poems might be construed as inciting readers to hatred, revolt and the use of violence”⁹⁹ but considered that the medium used by the applicant to spread his message was poetry, a form of artistic expression that appeals only to a minority of readers.¹⁰⁰

⁹⁴ *ibid.* 87, Concurring opinion

⁹⁵ *ibid.* 87, Joint Concurring Opinion;

⁹⁶ *ibid.* 87, Separate Concurring Opinion, Judge Bonello proposes a test employed by US Courts in *Abrahams v. United States*, *Brandenburg v. Ohio*, *Schenck v. United States*, *Whitney v. California*

⁹⁷ *ibid.* 87

⁹⁸ *Karatas v Turkey*, judgment 8/07/99

⁹⁹ *ibid.* 98

¹⁰⁰ *ibid.* 98, §49

The Court observed that the author was a private individual who expressed his views through poetry which by its nature reaches only very small audiences as compared to the power of mass media. The means of dissemination were of importance to the ECtHR, which determined that the impact of the message on “national security”, “[public] order” and “territorial integrity” will be limited as the artistic nature of the poems would not influence an audience to participate in an uprising.¹⁰¹ Consequently the ECtHR found a violation of Article 10.

As in *Gerger v Turkey*, several concurring judges pointed out that, although they shared the Court’s finding that there has been a violation of Article 10, the Court may be better served if it will employ a more contextual approach i.e. to analyze whether the language intended to inflame or incite to violence and whether there was a real and genuine risk that it might actually incite to terrorism or violence.

Although Judge Bonello, in a separate concurring opinion, agreed with the Court’s judgment that artistic expression must be protected, he reiterated that the test employed by the court needs to be revised as the yardstick employed by the ECtHR is insufficient: “I believe that punishment by the national authorities of those encouraging violence would be justifiable in a democratic society only if the incitement were such as to create “a clear and present danger”.

The case *Surek and Ozdemir v Turkey*¹⁰² concerns the freedom of expression of the owner and editor of a review, which were convicted by Turkish Courts for publishing declarations of terrorist organisations and disseminating separatist propaganda.

The ECtHR noted here that the review published two interviews with an important figure in the PKK and a statement issued on behalf of four illegal political organisations. The interviews given by the PKK figure criticised US and Turkish policies towards the Kurds. The PKK leader claimed that the war waged by the PKK on behalf of the Kurdish people will continue “until there is only one single individual left on our side”.¹⁰³

The ECtHR emphasized here that it will take into account the background to the cases i.e. the problems linked to the prevention of terrorism in Turkey. The Court noted that the author of the interview was a leading member of a proscribed organisation and upon semantic analysis of the interview it determined that the message was one of intransigence and a refusal to

¹⁰¹ *ibid.* 98,§52

¹⁰² *Surek and Ozdemir v Turkey*, 8/7/99

¹⁰³ *ibid.* 102

compromise with the authorities as long as the objectives of the PKK had not been secured. Subsequently, the ECtHR concluded that the texts taken as a whole did not incite to violence or hatred and found a violation of Article 10.¹⁰⁴

Once again in a joint concurring opinion, several judges pointed out that the ECtHR attaches too much weight to the form of words used in the publication and insufficient attention to the general context in which the words were used and their likely impact. Although the Court stressed that: “undoubtedly the language in question may be intemperate or even violent...in a democracy...even “fighting” words may be protected by Article 10”¹⁰⁵, the concurring judges emphasized that the ECtHR should afford more importance to the context of the speech as this approach “is more in keeping with the wide protection afforded to political speech in the Court’s case-law”.

Judge Bonello in its separate concurrent opinion argued once more that the test employed by the Court it is not reliable when it comes to speech which incites to terrorism or violence as it does not focus on establishing whether the expression in question involves “a clear and present danger” that an offence will be committed.

The case *Hogefeld v. Germany* is concerned with urban terrorism. The applicant, a former member of the RAF imprisoned for terrorist activities, complained that the refusal of the Frankfurt Court of Appeal to allow her to give interviews to mass media violates her right to freedom of expression. The German Court prohibited the applicant from issuing public statements in order to prevent the promotion of RAF ideology which may incite to terrorism.¹⁰⁶

The ECtHR was satisfied that the restriction was ‘provided by law’ and under the second part of the test it noted that terrorism by the RAF had been a major threat to national security and public safety thus satisfied the requirement that the restriction imposed on the applicant's right to freedom of expression pursued a legitimate aim.

The ECtHR went on to examine whether the Court of Appeal's refusal to allow the applicant to be interviewed and filmed answered a “pressing social need” and whether it was “proportionate to the legitimate aims pursued”. The Court analyzed the statements that the

¹⁰⁴ *ibid.* 102, §61

¹⁰⁵ *ibid.* 102

¹⁰⁶ *Hogefeld v Germany*, 2000, Admissibility to the European Court

applicant had made in previous occasions and upon a semantic analysis it pointed out the declarations made by the applicant were ‘ambiguous’ and that she continued to identify herself with the aims and the ideology of the RAF and saw herself as a leader of RAF. Moreover, she suggested that “one must continue to fight” for meeting RAF’s agenda.¹⁰⁷

Based on the content of applicant’s comments, the Court stressed that although the statements do not per se promote terrorist activities, they must be corroborated with the applicant's personal history as she was one of the main representatives of RAF. Following this logic the ECtHR inferred that the applicant’s words could possibly be understood by RAF supporters as an appeal to continue the activities of the RAF.¹⁰⁸ The Court concluded thus that the interference in issue was proportionate to the legitimate aims pursued and that no breach of Article 10 of the Convention was found.

We observe a similar model of analysis as in previous cases. The author of the statements in question was an important member of a terrorist organization, the content of the statements was ambiguous and the messages could have reached large populations due to the fact that the interviews were to be broadcasted or appear in the written media, accessible to other RAF members.

Once again we note that the ECtHR focuses on the content of the expression, on the position the applicant had in RAF, on the means of dissemination, but it can not be clearly grasped whether the expression in question involves the existence of a danger that a terrorist offences will be committed.

In *Zana v. Turkey* (2004),¹⁰⁹ the applicant Zana Mehdi, the same applicant in *Zana v. Turkey*, (1997) was found guilty by Ankara National Security Court on grounds of disseminating separatist propaganda.

The ECtHR established that the restriction was ‘prescribed by law’ and ‘pursued a legitimate aim’ as Turkey had to prevent and fight its domestic terrorism. Under the test of ‘necessary in a democratic society’ the Court scrutinized the content of the speech given by Zana at the EP and before the Human Rights Commission. Although the Court determined that, the

¹⁰⁷ *ibid.* 106

¹⁰⁸ *ibid.* 106

¹⁰⁹ *Zana v. Turquie*, No.2, 6/04/04

discourse was provocative and criticized Turkey in a virulent manner, it argued that the speech represented the “political expression” of the applicant.

The Court attached great importance to the fact that the statement was made at the European Parliament, and pointed out that Zana, in his quality of political actor in Turkey, intended nothing else but to debate the situation of the Kurdish population. This judgment shows that the Court applied *de nouveau* its model of analysis i.e. the Court looked at the author of the speech, Zana Mehdi which was a political figure from Turkey, at the content of the speech coined as being political due to the fact that the speech criticized the Turkish state and its policies applied to the Kurdish population.

Although the speech included “provocative statements” the ECtHR was not convinced that the speech could have had incited to violence, thus triggering “corrupting effects” on the public as the recipients of the discourse were European deputies and the Sub-Commission on Human Rights.

2.4 Analysis and conclusions

The cases presented under the ICCPR legal framework dealt with restrictions on the right to freedom of expression, with a focus on restrictions imposed on “national security” grounds. The analysis showed that restrictions must comply with the requirements of “prescribed by law” and “necessary for a legitimate purpose and proportional to the aim pursued”.

The HRC appears reluctant to address the issue of “provided by law”, although, in several cases, it did establish that interference with rights shall not be arbitrary and conflicting with the aims and objectives of the Covenant. This approach is compensated by the fact that under the “necessity and proportionality tests” the Committee will not permit restrictions on rights when the State Party concerned fails to provide: detailed justifications for the measures imposed, a pertinent analysis of the expression in question (how the expression may have an impact on audiences), or if the State fails to identify the exact nature of the threat. In such cases the Committee contends itself to merely reject the views of the State concerned, without promoting a clear model of analysis of the expression in question. Furthermore, the HRC demands that the State must adduce “sufficient” information to justify interference with the Convention’s rights in the sense that the State must provide detailed documentation regarding domestic decisions.

Furthermore, the HRC employs the criteria of reasonableness, construed to encompass that interference with the ICCPR rights must be proportional to the end sought and be necessary. In *Pietraroia v Uruguay*, the “proportionality” requirement demands that harsh penalties on political rights must be “specifically justified”.

The main concern of the analysis in 2.2.3 was to determine the standard of judicial review employed by the HRC concerning ‘expression’ construed by the domestic authorities as e.g. “incitement to violence”, “praising or encouraging anti-state activities”, “calls for insurgency” and “destruction of the constitutional order” . Particularly in these cases, the HRC does not effectuate a thorough judicial analysis of the requirement of “provided by law” although it points out that “careful scrutiny” is needed where the laws are formulated in “broad terms”. In several cases, the Committee simply accepts that the requirement of “provided by law” is complied with if the State concerned is able to show a legal basis for the restrictions. In *Kim v Korea*, although the HRC observed that the law was couched in broad and unspecific terms, it moved on to find a violation under the “necessity” test.

Despite limited jurisprudence exploring the issue of speech inciting to violence, the Committee’s case law indicates that where States restrict political speech on national security/public order grounds¹¹⁰ by claiming that the utterances incite to violence/terrorism, the HRC will find a violation of Article 19. This is illustrated in *Dergachev v Belarus*, where the HRC simply pointed out that the speech in question was political thus it can not be restricted. A similar approach was taken in *Mukong v Cameroon* where the HRC concluded that the rationale of “national unity” can not be achieved by prohibiting speech which criticizes the government and advocates political pluralism, democracy and human rights.

In relation to Article 20, the HRC did not produce any relevant jurisprudence which may cast light as to when expression may be defined as “propaganda for war” or when “advocacy” reaches the threshold of “inciting to violence”. However, we may infer from the wording of Article 20 that when dealing with issues such as “propaganda” and “advocacy inciting to violence”, states must prohibit and sanction such acts when they threaten or results in an act of aggression or breach of peace. We may also infer that the “threat” element that the speech poses must reach rather a high threshold in order to be prohibited by Article 20 and that such prohibitions are in line with Article 19 of the ICCPR.

¹¹⁰ Carlson, N. Scott, Gisvold, Gregory, *Practical Guide to the International Covenant on Civil and Political Rights*, p. 123

Under the ECHR legal framework, states imposing restrictions on rights under the rationale of national security/public order must respect the three part test discussed previously. The first test of “prescribed by law” encompassed an array of prerequisites e.g. the “law” in question must have some basis in domestic law, it must be of quality in the sense that it must provide legal protection against arbitrary interferences notably when executive discretion is involved. The law must be accessible and foreseeable allowing the individual concerned to regulate his/her behaviour e.g. a binding order obliging the applicants to “keep peace and good behavior” was deemed by the Court to lack the precision required by the “quality of law”.

In three particular occasions¹¹¹ the ECtHR found a violation of the ECHR as the domestic law of the State concerned failed to comply with the criteria of “prescribed by law”. This contrasts with the usual method of interpretation employed by the Court which typically finds violations under the test of “necessary in a democratic society”.

The second test, that “interference must pursue legitimate aims”, does not demand special analysis as its purpose is clear under the ECHR.

Under the test of “necessary in a democratic society” the Court clarified that its function is to exercise “supervisory jurisdiction” i.e. “to review” domestic decisions that States deliver pursuant to their power of appreciation. When deciding whether states overstepped their margin of discretion, the ECtHR will determine if the reasons invoked by the domestic authorities were “relevant and sufficient” to justify interference with the Convention’s rights.

It is beyond the scope of this paper to explore “the margin of appreciation doctrine” in cases other than the ones involving restrictions on national security grounds.

In cases related to national security/public order grounds, in particular, cases involving issues such as “surveillance measures” and counter terrorism, the ECtHR gives the State concerned a wide margin of appreciation when deciding upon how those measures are to be implemented in practice.

The Court established that a compromise between requirements for defending democratic society is inherent in the system of the Convention and that the State is permitted to choose

¹¹¹ Huvig v France, Kruslig v France and Hashman and Harrup v UK

the means for protecting its national security and democratic institution.¹¹² Although the Court appears to afford a wide margin of appreciation to States in relation national security issues, as mentioned in the *Klass* case, the Court makes clear that this margin is not unfettered. What appears at odds with this statement is the fact that the Court emphasized that “it must assume”¹¹³ that a democratic country such as FRG will correctly interpret the law in question. The same approach was evident in the *Murray* case where the ECtHR stated that it is willing to believe the arguments presented by the State without being provided access to the classified material regarding the case in question. A possible qualification to this bold statement was the Court’s insistence that the State “have to furnish some evidence”.

Turning to the ECtHR case analysis regarding speech inciting to terrorism/violence, the survey of landmark cases dealt with the restriction of the right to freedom of expression, where the restriction was grounded in national security grounds. In these cases, the approach taken by the Court under the first test of “prescribed by law” translates into mere acknowledgement that the restrictions had a basis in domestic laws without making any reference as to whether the domestic legislation was accessible, formulated with precision, foreseeable in allowing the persons concerned to regulate their conduct. This entails certain problems as in several cases concerning “expression which incites to terrorism” the applicants argued that the domestic laws were broad thus making impossible to estimate what behavior/speech is to be allowed or not.

By not according great attention to the principle of “prescribed by law” appears to be inconsistent with previous interpretation applied by the Court in *Huvig and Kruslin v France* and *Hashman and Harrup v UK*. Hence, one observation to be advanced with respect to the Court’s analysis in relation to cases involving the issue of national security, freedom of expression and terrorism, is that the ECtHR should consider to address whether domestic counter terrorism provisions complied with the rule of “prescribed by law” construed as to encompass the “quality of the law”. If not complied with, the Court should rule on a breach of the Convention without that the ECtHR examining compliance under other criteria.¹¹⁴

As regarding the second test that restriction “must pursue a legitimate aim”, the Court accepted that terrorism is to be recognized as a valid aim to impose restriction on the right to freedom of expression.

¹¹² *Klass and Others v Germany*

¹¹³ *ibid.* 112

¹¹⁴ Delmas-Marty, Mireille, *The Richness of Underlying Legal Reasoning*, p. 319, 1992

Under the third part of the test of “necessary in a democratic society” the ECtHR developed a specific framework of analysis which translates into employing the following model: who is the author of the speech; what is content and the meaning of the words; when and where it was said; and to whom the speech was addressed, including how many people heard the speech. It is clear from the cases surveyed that the content of the expression in question served as the main basis for evaluation. In cases where the author of the speech was a figure of authority in the community, but the content of the speech appeared to be ambiguous and difficult to grasp, the ECtHR found a violation of Article 10. In several cases, although the Court characterized the semantic content of the utterances as clearly aggressive and provocative, allowance was given if the expression was artistic in form or if it expressed political criticism.

The Court applies a model of analysis which serves fairly well the principles enshrined in the ECHR, but the test applied may find place for improvement as pointed out in concurring opinions. The ECtHR may need to reassess its working principles of interpretation regarding expression which incites to terrorism or violence as in cases involving “incitement to terrorism and violence” the ECtHR might be better served by employing the yardstick proposed by the concurring judge Bonello, i.e. incitement must be directed to provoke a “clear and present danger”, where the “danger” element is so imminent that it could have produced immediate effects.

3 New offences of terrorism in international law

3.1 “Apologie du terrorisme” and “incitement to terrorism”

The present chapter will examine the emergence of new crimes in regional and international law: “apologie du terrorisme” and/or “incitement to terrorism” (whether direct and indirect incitement) as provided for in the ECPT 196 and in SCR 1624.¹¹⁵

One major question to be answered is whether the offences of “apologie du terrorisme” and/or “incitement to terrorism”¹¹⁶ are defined clearly enough to allow States to implement them at domestic level in accordance with the requirements set out in the ECHR and ICCPR regarding the right to freedom of expression.

3.2 European Convention on the Prevention on Terrorism No. 196

3.2.1 The emergence of new offences of terrorism

The main concern of the drafters of the ECPT was to codify a new offence of “indirect provocation to commit a criminal offence”¹¹⁷ thus one of the main objectives of this chapter is to scrutinize the concept of “indirect incitement to terrorism”.

In order to cope with the new threats of terrorism which endangers the democracy of all European States, the COM set up a multidisciplinary Legal Group on International Action against Terrorism with the main function to establish whether domestic legislations contain provisions that criminalize public expression of praise, support and justifications of terrorists and/or terrorist crimes and incitement to terrorism¹¹⁸. Upon analysis of domestic legislations, CODEXTER-Apologie determined that there are legal grey areas in international law regarding the offences of ‘apologie du terrorisme’ and/or ‘incitement to terrorism’ and that the lacunae in international law may be remedied by elaborating a new international instrument on the prevention on terrorism.¹¹⁹

¹¹⁵ Annex II, ECPT 196 14/5/2005

¹¹⁶ Ribbelink, Olivier, “Analytical Report”, Apologie du terrorisme and Incitement to Terrorism, COE, 2004

¹¹⁷ Explanatory Report on The European Convention on the Prevention on Terrorism, 14 May 2005

¹¹⁸ Committee of Ministers Session, 6-7 November 2002

¹¹⁹ *ibid.* 116

In May 2005 the COM adopted the ECPT 196¹²⁰ which recalls in its Preamble that the measures adopted to prevent and suppress terrorism must respect international law and human rights law¹²¹. The ECPT indirectly recognizes that particular provisions incorporated in the Convention may have an impact on the right to freedom of expression by particularly stressing that the “Convention is not intended to affect established principles relating to freedom of expression and freedom of association”.¹²²

Article 5 of ECPT comprises the new born offence of “public provocation to commit a terrorist offence”.¹²³ The offence represents the main subject of analysis in the present chapter. The major issue to be discussed is whether the case law of the ECtHR supports the implementation of the offence of “public provocation to commit a terrorist offence” referred to as “indirect incitement to terrorism” or “apologie du terrorisme”. It seems that the ECtHR has not developed a ‘bulletproof’ model of interpretation when it comes to cases involving expression inciting to violence or terrorism. This may prove helpful for the interpretation of the newly adopted crimes of terrorism. To demonstrate this, I will draw upon the Explanatory Report attached to the ECPT¹²⁴ and on Article 10 of the ECHR¹²⁵ as well as on the ECtHR case law presented in Chapter II of the thesis.

3.2.2 Article 5; “public provocation to commit a terrorist offence”

Article 5(1) of the ECPT establishes the offence of “public provocation to commit a terrorist offence”. The offence consists in “distributing or “making available of a message to the public”, with the intent to incite the commission of a terrorist offence. The terminology of “public provocation” seems to be broad and to encompass an array of conducts hard to grasp, but the CODEXTER-Apologie specified that Article 5 focuses on criminalizing “public expressions of support for terrorist offences and/or groups”¹²⁶ and speech which may lead to the “[...] instigation of ethnic and religious tensions which can provide a basis for terrorism; the dissemination of "hate speech" and the promotion of ideologies favorable to terrorism.”¹²⁷

¹²⁰ *ibid.* 115

¹²¹ *ibid.* 115, Preamble

¹²² *ibid.* 115

¹²³ *ibid.* 121

¹²⁴ The ER is not an instrument of authoritative interpretation but it has a recognized function of facilitating the application of the provision contained in the 196 Convention, ER for the ECPT 196, 14/5/2005

¹²⁵ see Chapter II

¹²⁶ *ibid.* 123, §87

¹²⁷ *ibid.* 123, §88

The wording “distribution” in 5(1) refers to the active dissemination of a message advocating terrorism, while “making available” refers to expression that is easily accessible to the public.¹²⁸ Examples of distributing and making available messages can be found in ECtHR jurisprudence¹²⁹. In *Gerger v Turkey* the expression in question was a speech given at a public meeting, in the first *Zana v. Turkey* the expression in question was an interview given to a newspaper, in *Hogefeld v. Germany*¹³⁰ the expression in question would have been distributed through a TV documentary, radio and newspapers. Other recognized means of disseminating expression can be poems or literary works¹³¹ or if we look at HRC case law we note that a poster¹³² was considered as a valid means to disseminate ideas inciting to insurgency which may destabilize a country.

The offence of “public provocation to commit a terrorist offence”, Article 5(1) requires that the offence is done with the “intent to incite the commission of a terrorist offence” whether or not this conduct directly or indirectly advocates for the commission of a terrorist offence. Examples of indirect incitement to terrorism may be: “dissemination of messages praising a perpetrator of an attack, the denigration of victims, calls for funding for terrorist organizations, presenting a terrorist offence as necessary and justified or “other similar behavior”¹³³.

Based on the wording of Article 5, paragraph 1, the objective element of the offence of indirect incitement to terrorism consists in “the distribution or otherwise making available to the public of a message”, when such acts *indirectly* advocate the commission of a terrorist offence; while the “subjective element” of the crime (the mens rea) will consist in the specific intent of the individual concerned to incite the commission of a terrorist offence.¹³⁴

Besides the requirement of intent, Article 5(1) introduces a second essential requirement for the offence i.e. the conduct of public provocation must cause a danger that terrorist offences will be committed. Thus a message which indirectly incites to terrorism by causing a danger that other offences of terrorism will be committed, can be prohibited by law.¹³⁵

¹²⁸ *ibid.* 123

¹²⁹ CODEXTER meeting, COE. 2004

¹³⁰ see Chapter II

¹³¹ *ibid.* 123

¹³² see *Dergachev v. Belarus*

¹³³ *ibid.* 123, §95

¹³⁴ *ibid.* 115, Article 5(1)

¹³⁵ *ibid.* 132

The ER specifies that these two requirements must be strictly respected by the States parties when applying such counter terrorism provisions in domestic legislation.¹³⁶ Knowing thus that the ‘element of danger’ is essential for establishing whether there is an offence of indirect incitement to terrorism, it will be interesting to determine whether the ECtHR jurisprudence may support the application of such an offence.

The ER points out that the “danger” requirement can be deduced by addressing three core elements of the speech or message in question in the same way the ECtHR does in its jurisprudence involving the right to freedom of expression: who is the author and addressee and the context in which the message was distributed or made available.¹³⁷

This test has been developed by the ECtHR in cases involving the right to freedom of expression as seen in Chapter II. In brief, in the following cases: *Hogefeld v. Germany*, *Zana v. Turkey*, *Gerger v Turkey*, *Karatas v Turkey*, *Surek and Ozdemir v Turkey*, *Zana v. Turkey* (2004)¹³⁸, the Court constantly applied the following model of analysis: who is the author of the speech; what is the content and the meaning of the words, temporal aspect, spatial aspect: (when, where it was said?) and finally who is the recipient of the message, including how many people heard the speech.¹³⁹ I would note here that the selection of the case law used for the analysis of Article 5 considered cases coined by the CODEXTER as “specifically referring to incitement to violence and “apologie du terrorisme”.¹⁴⁰

In two cases: *Hogefeld v. Germany* and *Zana v Turkey* (1997)¹⁴¹ the ECtHR found no violation of the right to freedom of expression by plainly pointing that the speech of the applicant may be construed as having the potential to incite the commission of terrorist offences, but no further analysis was offered as whether the expression in question could clearly show that there was a “danger” that a terrorist offence would be committed. In *Karatas case*, *Surek and Ozdemir v Turkey*¹⁴² the ECtHR afforded great importance to the artistic nature of the expression and respectively to the freedom of press without clearly determining whether the expression could indeed incite to terrorism or violence. As observed in the two cases the concurring opinions stressed that the test applied by the court in such

¹³⁶ *ibid.* 122

¹³⁷ *ibid.* 122

¹³⁸ see Chapter II

¹³⁹ *ibid.* 136

¹⁴⁰ CODEXTER,

¹⁴¹ see Chapter II

¹⁴² *ibid* 140

cases needs a change of focus i.e. the Court needs to focus on whether the speech advocates immediate and grievous action.

Indeed, the Court applied the test that the ER mentions, but what it appears to lack in the ECtHR jurisprudence is a specific analysis of the element of “danger” as pointed out by the minority judges. This leads to a dilemma: how should States determine the limits of the offence of “indirect incitement to terrorism” based on jurisprudence from the ECtHR when the Court does not provide a better equipped framework to be applied when assessing the element of “danger” as Article 5 of the ECPT so requires.

As established by CODEXTER, States should also determine “the significance and clarity” of the ‘danger’ in the light and in accordance with their domestic law. Considering the variety of the thresholds that the European States will employ as yardstick to assess the ‘danger’ requirement, one might imply that the jurisprudence developed by domestic jurisdictions will vary to such a great extent that the overall implementation of the new counter terrorism provisions in contracting States will potentially lead to violations of the right to freedom of expression.

3.3 Security Council Resolution 1624 ¹⁴³

The SCR reaffirms the imperative to combat terrorism in all its forms and manifestations by all means while stressing that States must ensure that the counter terrorism measures comply with all their obligations under international law; in particular international human rights law, refugee law, and humanitarian law.

As a novelty, the SCR 1624 condemns incitement of terrorist activities and attempts at the justification or glorification (apologie) of terrorist acts that may incite further terrorist acts¹⁴⁴ and demands States to take all necessary and appropriate measures in accordance with international law at the national and international level to prohibit by law “incitement to commit a terrorist offence”.¹⁴⁵

The SCR specifies that the first right which is exposed to violations in the fight against terrorism is the right to freedom of expression as it is protected in Article 19 of the ICCPR

¹⁴³ SCR 1624, 14/9/2005

Annex II

¹⁴⁴ *ibid.* 143

¹⁴⁵ *ibid.* 143

(Article 20 of the ICCPR is not mentioned).¹⁴⁶ By making reference to the ICCPR, the SC established that any restriction imposed on the right to freedom of expression shall only be such as is provided by law and necessary on the grounds set out in paragraph 3 of Article 19 of the ICCPR.

Thus all counter terrorism measures which may impinge on the right to freedom of expression must respect the requirements set out by Article 19 of the ICCPR. Such restrictions are permitted only when they are ‘provided by law’, ‘necessary for a legitimate purpose’ and ‘proportional to the aim pursued’. Furthermore, restrictions must be seen and interpreted in the light of the ICCPR as a whole, they must be compatible with the aims and objectives set out by the Convention as showed in the jurisprudence of the HRC.¹⁴⁷

Knowing that the SCR 1624 demands States to criminalize “incitement to commit a terrorist offence” without specifying which are the elements of the crime, it can be inferred from the Resolution’s wording that States may prohibit all acts which they qualify as “incitement to commit a terrorist offence”. Looking at the activities condemned by the Resolution such as justification (apologia) or praising of terrorist activities one might argue that States will prohibit instances of “indirect incitement to terrorism” similar with the offence enshrined in the ECPT 196 as the SC stated that there is a need for new counter terrorism offences.

Resolution 1624 recognizes that extremism and intolerance are the causes of incitement to terrorism, thus one might inquire why the SCR 1624 does not make any reference to the provisions enlisted in Article 20 of ICCPR which prohibits propaganda of war and any advocacy or racial, national or religious hatred. As we noted in the analysis effectuated in Chapter II, the GC 11 establishes that the provisions enshrined in Article 20 shall be construed as “[...] to extend to all forms of propaganda threatening or resulting in an act of aggression or breach of the peace [...] while paragraph 2 was directed against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”¹⁴⁸

It appears that compliance with Article 20 of the ICCPR may be effective in the fight against terrorism rather than the SC to urge the adoption of new provisions. The ER of the ECPT makes a clear parallel between the offence of incitement to hatred and incitement to terrorism as to how both conducts of incitement represent permissible limitations on the right to

¹⁴⁶ *ibid.* 143

¹⁴⁷ see Chapter II

¹⁴⁸ *ibid.* 147

freedom of expression. Following this logic, it is surprising that SCR 1624 does not refer to article 20 of the ICCPR.

Although the SCR 1624 acknowledged that counter terrorism measures may infringe on the non refoulement principle, it demands States “[t]o deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of conduct which may trigger terrorist acts”¹⁴⁹. Safe havens must be denied for the purposes of preventing individuals to incite to terrorism, where there is information that the individual is “guilty of conduct which may trigger terrorist acts”. It is unfortunate that the SCR 1624 does not provide further information regarding the terminology of “guilty conduct”.

3.4 Analysis and conclusions

What the two official instruments have in common is that they create new offences in international law to criminalize ‘apologie du terrorisme’ and/or ‘incitement to terrorism’ with the objective to create effective counter terrorism measures in the fight against terrorism. Both instruments demand States to adopt counter terrorism measures while emphasizing that such measures must in all cases respect the rule of law, human rights law, refugee law, democratic values, fundamental values, etc.

To summarize the findings regarding the ECPT 196 and SCR 1624, we noted that the offence of “public provocation to commit a terrorist offence” must be committed with “intent” and must “cause a danger” while the SCR 1624 does not contain any similar element. Although the Resolution specifies that the offence of incitement to terrorism may have an impact on refugees and asylum seekers, it does not make any reference to the CAT, which prohibits extraordinary rendition. This may be interpreted by States as a carte blanche to ignore the principle of non refoulement.

Furthermore, upon analysis of ECtHR jurisprudence concerned with “indirect incitement to terrorism and violence”, it can not be clearly inferred when freedom of expression mutates into speech inciting to violence or terrorism. Thus, in the light of the concurring opinions I suggested that the ECtHR jurisprudence may only partially support the application of the new offence of “public provocation to commit a terrorist offence” when construed as “indirect incitement to terrorism”.

¹⁴⁹ *ibid.* 143

With respect to SCR 1624, the purpose of the Resolution was to urge States to outlaw “incitement of terrorist acts and attempts at the justification or glorification (apologie) of terrorist acts that may incite further terrorist acts”¹⁵⁰. The Resolution does not make any reference as to what constitutes the offence of incitement to terrorism other than pointing out that it may trigger terrorist acts and does not provide any guidance regarding the objective and subjective elements of the crime.

The analysis of the two counter terrorism instruments shows that States enjoy rather wide powers when adopting and interpreting the newly emerged offences of terrorism. For example under the ECPT States enjoy wide discretion regarding the application, implementation and interpretation of Article 5 while the SCR 1624 demands States to adopt new counter terrorism legislation without providing for the elements of the crime. This State discretion must be limited by the work of the international human rights bodies.

One way to limit State discretion in this era of “war on terror” is for the ECtHR to embrace the approach suggested in Chapter II i.e. the Court should be willing to find violations under the criterion of “prescribed by law” as to encompass the element of “quality of law”. The same approach should be followed by the HRC. If the two international bodies will apply the method consistently this may prove valuable as there is a need for guidance regarding the newly emerged counter terrorism offences which criminalize expression. Such an approach may prevent that the work of the ECtHR and HRC will be unnecessarily loaded.

Furthermore, the ECtHR law, as it currently stands, could be altered to better accommodate such terrorism offences, by introducing the “test” proposed by concurring Judge Bonello, and other. This test would stipulate that the expression must involve ‘a clear and present danger’ that ‘immediate and serious violence’ is to be expected. Such a test would allow the Court to determine when “indirect incitement to terrorism” reaches the threshold of danger. This proposed test is quite similar to the standards proposed by the Johannesburg Principles¹⁵¹ which in Principle 6 provides that restrictions shall be applied on freedom of expression on grounds of national security only when: “the expression is intended to incite imminent violence; it is

¹⁵⁰ *ibid.* 143

¹⁵¹ Johannesburg Principles: National Security, Freedom of Expression and Access to Information adopted 1 October, 1995.

likely to incite violence and there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence”¹⁵²

It is generally accepted that the separate opinions delivered by concurring or dissenting judges contribute to legal development by presenting “an alternative line of analysis which may inspire or invite second thoughts about the matter in future.”¹⁵³

Despite the efforts of the UN and COE in reiterating the need to respect the rule of law, there are certain trends at domestic level which suggest that States will be tempted to abuse their legislative powers when adopting counter terrorism measures criminalizing “incitement to terrorism”.

¹⁵² Mendel, Toby, National Security v. Openness: And Overview and Status Report on the Johannesburg Principles, 2003

¹⁵³ Merrills, J.G., The Development of International Law by the ECtHR”, p.38, 1993

4 Counter Terrorism measures in two case studies

4.1 *Novel crimes*

The present chapter is a survey of the counter-terrorism measures adopted by Germany and the United Kingdom, measures which incorporate provisions that may have an impact on the right to freedom of expression. It will analyze whether the counter terrorism measures respect the requirements set out in Article 10 of ECHR and Article 19 and 20 of the ICCPR for imposing restrictions on the right to freedom of expression. I will also explore whether the domestic counter terrorism measures are in line with Article 5 of the ECPT 196 and SCR 1624.

After introducing the relevant counter-terrorism legislation adopted by these countries I will conclude by presenting the reasons why these counter terrorism measures may challenge the existent legal framework for the protection of human rights.

4.2 *Counter terrorism in Germany*

4.2.1 The Immigration Act (Aufenthaltsgesetz)

The most relevant law for the purposes of the present thesis is the German Immigration Act which came into effect on 1 January 2005 and hardens the provisions for regular and discretionary expulsion and deportation of foreigners.¹⁵⁴ This Law provides for the exclusion or expulsion of aliens who undermine public safety and order by [...] “inciting hate or violence against sections of the population or by denigrating them”. Such persons can be expelled by regular expulsion when they threaten the democratic order or national security, pursue political aims by violent means or publicly incite violence and are members of an organization which supports international terrorism.¹⁵⁵ The wording “support” is not defined but, it could potentially include dissemination of expression which is favorable to a terrorist organization.

¹⁵⁴ See Annex III: Immigration Act, Germany, January 2005

¹⁵⁵ Aliens Act, Article 47 para.2; Counter-terrorism Law Article 11, para.8

More problematic is the provision regarding discretionary expulsion which criminalizes “hate preaching”¹⁵⁶. The provision specifies that expulsion shall be applied to ‘hate mongers’ which use speech that ‘condones’ war crimes and terrorism in a manner which may or instigate violence or hate. These provisions specifically impose limitations on freedom of expression thus it must be determined whether the restriction complies with the requirements set out in Article 10 of ECHR and Article 19 of ICCPR.

The German Law allows for discretionary expulsion when the person concerned ‘condones’ war crimes and terrorist acts or incites hatred “in a manner conducive to disturbing public safety and order.”¹⁵⁷ The law does not clarify the meaning of the wording ‘condones’ which suggests that the provisions are very broad permitting various interpretations thus contrary to the ECtHR practice.¹⁵⁸ Regarding the “regular expulsion” provision, the law contains terminology such as ‘support to a terrorist organization’ which appears ambiguous as ‘support’ may denominate activities ranging from simple approval of terrorist acts to grave serious acts of terrorism.

The approach that the ECtHR takes in cases involving restriction on rights is, firstly, to determine whether the restriction is ‘prescribed by law’, usually in the sense that the provision is enshrined into a particular law. This may lead, in some cases, to a lack of analysis with regard to the content of the law as such, as is reflected, for example, in the case *Piermont v. France*.

In this case, the applicant complained that her right to freedom of expression was violated by a discretionary expulsion order issued by the French authorities which prevented her from re-entering the French Polynesia. The State concerned argued that the speech given by the applicant, in a demonstration where she opposed anti-nuclear programs and expressed support for independence claims, threatened its public order.

The ECtHR stressed here that the discretionary police measures enjoyed by the French High Commissioner to ban individuals from entering the country on grounds of public safety respected the criteria of “prescribed by law”.¹⁵⁹ The Court plainly accepted that the restriction was prescribed in Immigration Law without specifying whether ‘prescribed by law’

¹⁵⁶ Hate preachers, labeled as “intellectual incendiaries”

¹⁵⁷ *ibid.* 154

¹⁵⁸ *Huvig v France, Hushman and Hurray v UK*

¹⁵⁹ see Chapter II

also reflects the quality of the law¹⁶⁰ although the applicant complained that she could not understand what the law required or prohibited in order to regulate her speech or conduct.¹⁶¹

The same approach was observed in the HRC practice which, although it establishes that the principle of “prescribed by law” must be interpreted in the light of the ICCPR as a whole and that the restriction shall not jeopardize the right itself, it does not address this issue on a regular basis. However, the HRC will analyze the case under the “test of necessity and proportionality” and, if the State fails to provide both “sufficient” information to justify the interference and a pertinent analysis of the expression in question and how that expression may have an impact on audiences, the HRC will find a violation under Article 19.¹⁶²

A similar stance is taken by the ECtHR in *Piermont v France* where, under the test of “necessary in a democratic society”, it found that the State did not strike a proper balance between the “public interest” rationale and the freedom of expression of the applicant. The Court held that the State failed to demonstrate that the applicant’s expression triggered any violence as the demonstration was not followed by unrest in Polynesia.¹⁶³ In this isolated case, the Court is seen to require that a causal link is established between the utterances and some actual threat.

The German Immigration Law allows for individuals to be expelled “[...] not only for proven wrong-doing, but also on the basis of an “evidence-based threat prognosis”¹⁶⁴ thus it is implied that evidence is neither necessary nor mandatory in order to execute expulsion procedures. This appears to be in breach with the SCR 1624 as the Resolution requires that “safe havens” to be denied to non citizens only when “credible and relevant information” stays at the basis of expulsions although no further details are provided as to clarify the meaning of “credible and relevant information”.

The German authorities do not employ any reliable tests to assess whether the expression indeed incites or condones terrorism, as the ECtHR applied in the *Piermont* case to establish whether the applicant’s speech produced violence. Furthermore, in the light of the *Hashman and Harrup* judgment, where the ECtHR decided that a binding-order violates Article 10 as it

¹⁶⁰ *Malone v. UK*

¹⁶¹ see Chapter II

¹⁶² *ibid.* 161

¹⁶³ *ibid.* 161

¹⁶⁴ Fekete, Liz, “Europe: Speech Crimes and Deportations”, in *Race and Class*, Sage Publications, Institute of Race Relations, Vol. 47-3, 2006

has “purely prospective effect” without requiring a finding that a breach of the peace has been triggered, I would conclude that the expulsion provisions employed by Germany may also be in breach with Article 10 of ECHR.¹⁶⁵

4.2.2 Relevant domestic jurisprudence

The first to be expelled was an imam of Egyptian origin on the grounds that he threatens national security by “preaching hatred and violence and calling on Muslims to defend their religion against the evils of the imperialism.”¹⁶⁶ Another case involves Imam Tasci Yakup¹⁶⁷ suspected of activities which were “seriously endangering public safety and order and putting in danger peaceful coexistence between Germans and non-Germans.”¹⁶⁸ The expulsion order quoted a speech where the Imam “[...] glorified Islamic martyrs in Iraq and Jerusalem and, in the form of a poem suggested suicide attacks in Germany.”¹⁶⁹

Based on the cases presented above one observes that persons are considered a ‘threat to national security’ solely based on the content of the speech, expression or statement made by the person concerned.

4.3 Counter terrorism in United Kingdom

The present case study is concerned with legislation adopted in 2005, when the London bombings gave a new boost to the UK authorities to undertake new initiatives to improve an already “impressive armory of legal measures against domestic and international terrorism”.¹⁷⁰

The main objective of the study is to analyze firstly, the new offences of ‘encouragement to terrorism’ and ‘glorification of terrorism’ such as the ones incorporated in the Terrorism Act 2006¹⁷¹ and secondly, the UK immigration legislation which specifically creates new crimes such as ‘apology of terrorism’ and ‘glorification of terrorism’ as valid grounds for expulsion of non-British citizens.

¹⁶⁵ see *Huvig and Kruslin v France*, *Handyside v UK*

¹⁶⁶ *ibid.* 164, see Fekete, Liz

¹⁶⁷ *ibid.* 164

¹⁶⁸ *ibid.* 164

¹⁶⁹ *ibid.* 164, p. 86

¹⁷⁰ Hadden, Tom, “National Anti-Terrorist Measures in the United Kingdom”, p. 117

¹⁷¹ See Annex III, The Terrorism Act 2006, 13/4/2006

4.3.1 UK instruments in the fight against terrorism: The Terrorism Act 2006

In the aftermath of the London terrorist attacks, Charles Clarke then UK Home Secretary argued that the adoption of the new offences of terrorism will enable the UK to ratify the 2005 ECPT 196.¹⁷² He also insisted on using the word ‘glorification’ by arguing that the SCR1624 so requires¹⁷³ while emphasizing that “[the] Government believes that the glorification of terror is an essential—I emphasize that word—method that is used by individuals and organizations that pursue terrorist ambitions and wish to get individuals such as the 7/7 bombers to commit to their suicidal and destructive ends.”¹⁷⁴

Chapter 11 of the Terrorism Act outlaws in Part 1 the following offence: encouragement of terrorism which in clause 1 establishes that the offence of ‘encouragement of terrorism’ applies as provided for in clause 1(1) “[t]o a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences.”¹⁷⁵

Firstly, we note that “encouragement of terrorism” applies to utterances likely to be understood by the audiences as “direct or indirect incitement”. This implies that the author of the utterances must predict or foresee how his speech would be interpreted or understood by the audiences; secondly the clause may lead to debatable jurisprudence. This may lead to situations where the speaker will be punished solely based on whether in the audience there were any responsive listeners.¹⁷⁶ Furthermore, clause 1(1) also mentions “other inductions” that may lead to the commission of acts of terrorism. The term “inductions” is not defined leaving the clause open to broad interpretations.

Clause 1(2)(a) establishes that the offence is committed when a person publishes or makes another individual to publish a statement¹⁷⁷ while clause 1(2)(b)(i) requires that the person “intends members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences”¹⁷⁸ or as spelled out in clause

¹⁷² Peck, Miriam, House of Commons, Research Paper: Terrorism Bill 2005-2006, 20 October 2005

¹⁷³ House of Lords, Third Reading of the Terrorism Bill 2006, 25 February 2006

¹⁷⁴ *ibid.* 173

¹⁷⁵ *ibid.* 172

¹⁷⁶ Greenwalt, Kent: Speech, Crime. And the Uses of Language, pp. 261-276

¹⁷⁷ *ibid.* 171, clause 2(a)

¹⁷⁸ *ibid.* 171, 1(2) (b)(i)

1(2)(b)(ii) “he is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate such acts or offences.”¹⁷⁹

While clause 1(2)(b)(i) requires that the individual concerned must have the intention to encourage directly or indirectly the members of the public to commit, prepare, instigate acts of terrorism, clause 1(2)(b)(ii) provides that an individual is guilty if he is reckless that the public may construe his statement as “encouragement of terrorism”. There are two observations to be made here: firstly, the introduction of the wording reckless implies that the criminal liability of the individual can be established despite that the individual did not have the intention to commit such an offence, secondly the statement is to be construed as “encouragement” based on how the audience perceives or interprets the statement. This objective test of establishing guilt was preferred as Hazel Blears MP, argued that “If we have only a subjective test, people will be able to say that they did not realise what the effect of their actions would be. We would then find it incredibly difficult to prosecute people who genuinely were encouraging other people, indirectly, to commit terrorist acts”.¹⁸⁰

Knowing that Article 5 of the ECPT strictly requires that the offence of “public provocation to commit a terrorist offence” must be committed with “the intent to incite the commission of a terrorist offence” I would argue that based on the fact that clause 1(2)(b)(ii) of the Terrorism Act 2006 lacks such an element, the clause fails to comply with the rules laid down in the ECPT.

Moreover the issue of establishing criminal liability based on “recklessness” would be contrary to the HRC practice i.e. as we noted in *Kim v. Republic of Korea*, the Committee found a violation of the right to freedom of expression when the guilt of the author was established by domestic courts solely on the basis that “mere knowledge” that an activity might benefit the enemy suffices for criminal liability to arise. Following these findings I would argue that the standard of “reckless”¹⁸¹ to establish guilt implies even less criminal liability than the standard of “mere knowledge” thus clause 2(b)(ii) appears to violate Article 19 of ICCPR.

Next, we note that clause 1(3) of the 2006 Act provides examples of statements likely to be understood by the public as to indirectly encourage the commission or preparation of acts of

¹⁷⁹ *ibid.* 171, 1(2) (b) (ii)

¹⁸⁰ House of Commons, House of Lords, Joint Committee on Human Rights, Counter Terrorism Policy and Human Rights, Terrorism Bill and Related Matters, Third Report of Session, 2005-2006

¹⁸¹ see Greenwalt, who argues that the lowest acceptable standard of culpability should be recklessness

terrorism such as: “1(3)(a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and 1(3)(b) is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.”¹⁸²

To summarize clause 1(3)(a) specifies that glorification of the commission or perpetration of an offence of terrorism may be a “statement” that could be reasonably interpreted by the members of the public as “conduct” that should be emulated by them.

Knowing that this provision of indirect incitement to terrorism as enshrined in 1(3) (a) and (b) must comply with the ECPT one must recall that ECPT requires that the offence enshrined in Article 5 to be committed with “intent” and that the offence must cause a “danger that a terrorism offence will be committed”.

Although clause 1 of the UK Terrorist Act does not include an element similar to the one in Article 5 of ECPT, it does require that, when assessing whether a statement will indirectly encourage the public to commit or prepare acts of terrorism, a two part test of analysis be applied. Clause 1(4)(a) requires that one must look at the content of the statement as a whole and secondly, clause 1(4)(b) requires an analysis of the circumstances or manner of the publication.¹⁸³

Upon ratification of the ECPT, the domestic rules of interpretation must be compatible with the rules of interpretation as spelled out in the ER of the ECPT which provides that the interpretation of provisions emulated from Article 5 of the ECPT shall be done in compliance with the ECtHR jurisprudence and with the domestic laws of the State party.

Although we note that clause 1(4) provides for an interpretation test which reminds of the test employed by the ECtHR jurisprudence and the test proposed by the ER of the ECPT 196, the UK test does not appear complete as it does not establish that the offence of “indirect encouragement of terrorism offence” must cause a “danger” that a terrorist offence will be committed. The UK offence excludes the existence of a causal link between the statement of encouragement and the commission of acts of terrorism. This may be in breach with the ECPT which established that Article 5 focuses on “causality links-direct or indirect-ex ante or ex post-with the perpetration of a terrorist offence.”¹⁸⁴

¹⁸² *ibid.* 171

¹⁸³ *ibid.* 171, 1(2)(4)(a), 1(2)(4)(b)

¹⁸⁴ see Chapter III, ECPT 196

4.3.2 “The Home Office List of Unacceptable Behaviors”

In August 2005 the UK government announced the adoption of a list of “unacceptable behaviors”¹⁸⁵ which added new grounds of exclusion to the list of national security grounds for the deportation or exclusion of foreign nationals. The list provides that exclusions/deportations may be conducted when the individuals concerned are authors of speech or publication of views which have the potential to “foment, justify or glorify terrorism”, may provoke others to commit terrorist acts or “foster hatred” that might lead to inter-community violence in the UK. The Home Secretary may apply his powers personally to exclude people before they come to the UK and the individuals may seek a judicial review of his decision. The LUB also allows for a right of appeal where the Home Secretary, or other Home Office ministers or officials, decide to deport an individual who is already in the UK.¹⁸⁶

The LUB imposes restrictions on the right to freedom of expression thus it must comply with international human right law namely with the requirements set out in Article 10 of the ECHR and Article 19 of the ICCPR. Those standards, applied in the HRC and ECtHR practice show that restriction such as the ones provided for in LUB, must comply with the requirements of “provided by law”, “pursue a legitimate aim” and “necessary in a democratic society”.

The requirement of “prescribed by law” entails that the restrictions must be formulated in a unequivocal way, enabling thus the individual concerned to understand what is to be permitted by law and what is to be prohibited and to “foresee” the consequences that his behavior/action may entail.¹⁸⁷ Considering that the LUB does not provide any further guidance with regard to the meaning of the wording “foment, justify or glorify terrorist violence”, which are not defined legal concepts in British law, it appears that the interpretation of such wording is difficult to be made if not impossible.

However, the HRC established that domestic law which appears broad in scope may be in compliance with the requirement of prescribed by law when applied compatibly, in a particular case. The same goes for the ECtHR which accepts that consequences need not be foreseeable with absolute certainty and “that many laws are inevitably couched in terms

¹⁸⁵ Home Office Policy , Released 24 August 2005, see Annex III

¹⁸⁶ *ibid.* 185

¹⁸⁷ *Silver v United Kingdom*

which, to a greater or lesser extent, are vague”¹⁸⁸. This interpretation did not prevent the ECtHR to find a violation of Article 10, under the test of “prescribed by law”, where a “binding-order” used unclear words to regulate the behavior of the individuals.

The ECtHR established in *Huvig v France* that the criteria of “prescribed by law” must mirror the “quality of law” i.e. the law must provide “adequate safeguards against various possible abuses”. In this case the Court determined that the domestic law violated the Convention as it did not “indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities”. Moreover, in the *Malone* judgment, the ECtHR decided that States must provide adequate measures of legal protection against arbitrary interferences by public authorities with the rights guaranteed.

The UK List does not provide any substantive criteria for how the discretionary powers of the HS should be employed, other than mentioning that the HS must act “proportionately and reasonably” when assessing whether aliens are “not conducive to the public good”. Moreover the LUB establishes that the HS may vary the criteria for excluding or deporting individuals whenever they deem necessary.

The LUB does provide that aliens can appeal the decisions of deportation taken by the HS, to SIAC¹⁸⁹, a special Commission which¹⁹⁰, in all terrorism related cases, operates in secret, where the person concerned and his/her lawyer does not have accesses to all the evidence. It must be determined whether such a “safeguard” complies with the requirement of “prescribed by law” in the sense of providing an adequate legal protection against State abuse¹⁹¹ and complies with the principle of “necessary in a democratic society”.

In the *Huvig* case the ECtHR determined that the domestic law violated the ECHR as it did not reasonably indicate the discretion conferred on the public authorities, while in *Klass v Germany* the ECtHR concluded that it “must assume” that a democratic state such as Germany correctly applies the domestic law although the law excluded the possibility of judicial review. Furthermore, in *Murray v UK*, the Court plainly stated that it is “prepared to attach some credence to the respondent Government that it possessed reliable but confidential information” that the applicant was involved in terrorist activities. On the basis of the above

¹⁸⁸ see Chapter II

¹⁸⁹ Special Immigration Appeal Commission

¹⁹⁰ see Chapter II

¹⁹¹ *ibid.* 190

judgements, it is not clear whether such safeguard as SIAC may be found in breach with the ECHR's guarantees.

The ECtHR emphasized that States have a "margin of discretion" when deciding how restrictions should be implemented in practice while it stressed that the State must produce "sufficient and relevant" reasons to justify such restrictions. Moreover, such restrictions must be proportionate to the legitimate aim pursued. When the State fails to provide such information the Court will usually find a violation under the test of "necessary in a democratic society".¹⁹²

To illustrate, while the ECtHR accepted that discretionary administrative powers respect the requirement of "prescribed by law", the provisions failed to pass the test of "necessary in a democratic society". As shown in *Piermont v. France* if states fail to demonstrate the exact threat that the expression poses to national security, the Court will find a violation of Article 10.

The HRC adopted a similar stance and determined that the restriction imposed by states must provide sufficient justifications for the measures imposed. Moreover, as observed in HRC jurisprudence States are under the obligation to prove how the restrictions are applied in specific cases while under "the necessity and proportionality" test, States must demonstrate that the measures adopted, were necessary and proportional to avert a specific threat.

4.3.3 Relevant domestic jurisprudence

At the adoption of the LUB, it was argued by NGOs and scholars that it will have a major impact on freedom of expression and on other human rights as such legislation restricting 'indirect threats' is simply an invitation to abuse."¹⁹³ Despite these troubling implications the list was adopted as such. This may seem surprising, but when looking at existent domestic jurisprudence involving the issue of national security and terrorism prevention one might suggest that the new provisions are likely not to be found in breaching the right to freedom of expression as codified in the ECHR and ICCPR.

¹⁹² see *Malone* case and *Klass* case

¹⁹³ Article 19, Home Office List of Unacceptable Behaviors: Freedom of Expression the Scapegoat of Political Expediency, October 2005, p.3

For example, the concept of national security was touched upon in the case *Secretary of State for the Home Department v. Rehman*¹⁹⁴ where the House of Lords pointed out that the Secretary of State has “carte blanche” when deciding what individuals represent a threat to national security or not.

This approach was followed¹⁹⁵ in the case *R. v. Secretary of State* where the Court of Appeal stated that it is [...] appropriate to accord a wide margin of discretion to the Secretary of State.¹⁹⁶ It seems that in the aftermath of the terrorist attacks, the Secretary of State has a recognized function to assess what may represent a danger to national security, thus he will take whatever measures he may deem necessary in cases of expulsions.

Moreover if the same stance is followed in immigration case law involving offences under the LUB and if the decisions involving national security issues will not be subjected to judicial review this suggests that “courts are already developing what [is] termed an “autonomous concept of deference” which demonstrates the judges’ credentials.”¹⁹⁷

To summarize the findings in the UK case, one might note that the Terrorism Act 2006 and the LUB include provisions which may restrict the right to freedom of expression. Although it may be argued that the offences enlisted in the LUB pursue a legitimate aim to prevent terrorism, it is likely that those measures fell short of the requirement of “prescribed by law/provided by law”.

The Terrorist Act 2006 provides for the offence of “encouragement of terrorism”, offence adopted by UK in order to ratify the ECPT 196. It remains to be seen whether such ratification is possible as the UK’s “encouragement to terrorism” offence fails to provide for the elements of ‘intent’ and ‘danger’ as Article 5 of the ECPT requires.

The standard employed by SIAC for establishing guilt “needs not to be proved beyond reasonable doubt”,¹⁹⁸ this may imply that the UK appeal procedure may be in breach with the requirements set out in the SCR 1624 which demand States that aliens shall be denied

¹⁹⁴ *Secretary of State for the Home Department v. Rehman*, 2001, UKHL; 47, 2003, 1 A.C. 153, (HL), *Rehman*

¹⁹⁵ Thomas, A. Philip, “Emergency and Anti-Terrorist Powers, 9/11: USA and UK, *Fordham International Law Review Journal*, Vol. 26, 2002-2003

¹⁹⁶ *R. V. Secretary of State for the Home Department ex parte, Louis Farrackhan*

¹⁹⁷ Tomkins, Adam, “Defining and Delimiting National Security”, *Case Comment, Law Quarterly Review*, 2002, 118 April, 200-203

¹⁹⁸ Press Release, Liberty, Anti-Terrorism Detainees, SIAC Hearings, 2005

“safe haven” when there is “clear and relevant information” giving serious reasons to believe that the individual concerned is involved in terrorist activities.

The SCR 1624 demands that states must respect the “rule of law” while requiring them to condemn acts of praising and justifying terrorism without providing any clear standards for how this provisions should be construed. I would argue that the lack of a clear definition allowed UK to invoke the SCR 1624 to adopt loose provisions when restricting rights.

4.4 Concluding remarks

States may adopt measures for the preservation of national security or public order as provided for in Article 10 and Articles 19, 20 of the ICCPR, but those measures must comply with the criteria of “prescribed by law”, “pursue a legitimate aim” and “necessary in a democratic society”. Apart from compliance with human rights law the domestic measures must also comply with regional and international counter terrorism rules such as the ECPT and SCR 1624.

As a common denominator of the counter terrorism measures adopted by the two countries we note that the provisions may restrict the right to freedom of expression and the measures appear to be in breach with the principle of “prescribed/provided by law.” Although the fight and prevention on terrorism may be considered as a legitimate ground to restrict the right to freedom of expression this does not entail clamping down on the above principles. The vagueness of many provisions in the immigration legislation adopted by Germany and UK opens the door to broad interpretations and leaves individuals in uncertainty about which conduct is actually prohibited, thus violating the right to freedom of expression as enshrined in ECHR and ICCPR.

There are positive safeguards against such flawed measures such as the ones provided by the the ECtHR and HRC.¹⁹⁹ However, the ECtHR and the HRC are not always consistent in the judgments they deliver. These inconsistencies are more evident in cases where the “interferences” imposed are for the prevention and fight of terrorism for the preservation of national security/public order.

¹⁹⁹ see Chapter II

5 Summary and final remarks

Focusing on the legal framework provided by the ICCPR and ECHR and based on relevant jurisprudence of the ECtHR and of the HRC regarding in particular, the right to freedom of expression we determined that the judicial interpretation offered by the regional and international regime needs, to certain extent, to be revised. It appears that further authoritative illumination is required in order to clarify precisely the standard by which “indirect incitement” is judged so it does not restrict expression which does not amount to clear advocacy to commit terrorist offences.

In the light of the legal framework presented in Chapter II and upon analysis of ECPT 196 and of SCR 1624 I have canvassed a number of problems related to the offences of “apologie du terrorisme” and/or “incitement to terrorism.” Mainly I have assumed that the test of judicial interpretation of the ECtHR and HRC only partially supports the application of the new offences of terrorism and that due to the rather wide discretion that States enjoy when applying and interpreting the new terrorism offences, the right to freedom of expression may be jeopardized.

The two country studies demonstrate that legislators called upon to enact speech-restrictive counter terrorism legislation adopted laws which not only fail to comply with the standards provided for in the ECHR and ICCPR, but also are partially in breach with the rules enshrined in the ECPT 196. Regarding the SCR 1624 I would stress that its wording is too general to allow us to clearly assess whether domestic counter terrorism measures comply with it.

Furthermore, we recognized that under the ‘umbrella’ of the SC Resolution 1624 and ECPT 196 States started to use the concepts of “apologie du terrorisme” and/or “indirect incitement to terrorism” in different provisions and with different meanings or consequences. Although the basic idea of both instruments was to build a common approach in the fight against terrorism we note that the two instruments created a panoply of domestic counter terrorism measures which might trigger violations of the right to freedom of expression.

This appears evident as the Joint Declaration on the Right to Freedom of Expression, pointed out, only a few months after the adoption of the ECPT 196 and of the SCR 1624 that “[...] States should not employ vague terms such as ‘glorifying’ or ‘promoting’ terrorism when restricting expression”. Incitement should be understood as a direct call to engage in terrorism, with the intention that this should promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring.”²⁰⁰

The present thesis offers a modest approach regarding counter terrorism measures which impose restrictions on the right to freedom of expression on national security grounds, but perhaps, the major lesson offered by the thesis is the complexity of the issues it addresses. Although it is out of the scope of this thesis to promote a clear cut conclusion as to whether the offences of “apologie du terrorisme” and/or “incitement to terrorism” are or not needed in criminal laws, I would simply conclude that since they are already adopted, their application must be kept under close scrutiny.

²⁰⁰ “International Mechanisms for Promoting Freedom of Expression”, Joint Declaration , 21 December 2005

Bibliography

Books

Carlson, N. Scott, Gisvold, Gregory, “*Practical Guide to the International Covenant on Civil and Political Rights*”, Ardsley, N.Y., Transnational Publishers, 2003

Coliver, Sandra, “*Striking a balance: Hate Speech, Freedom of Expression and Non-Discrimination*”, London, Human Rights Center Essex, 1992

Dijk, van P., Hoof, G.J.H., “*Theory and Practice of the European Convention on Human Rights*”, Kluwer Law International, Netherlands, 1998

Greenwalt, Kent, “*Speech, Crime and the Uses of Language*”, Oxford University Press, 1989

Loucaides, G. Loukis, “*Essays on the Developing Law of Human Rights*”, Kluwer Academic Publishers, Dordrecht, the Netherlands, 1995

McCarthy Svensson, Anna-Lena, “*A Basic Legal Framework for Considering Limitations on the Enjoyment of Human Rights*”,

McGoldrick, Dominic, “*The Human Rights Committee, Its Role in the Development of the International Covenant on Civil and Political Rights*”, Clarendon Press, Oxford, 1991

Merrills, J.G., “*The Development of International Law by the European Court of Human Rights*”, Manchester University Press, 1993

Edited Books

Coliver, Sandra, Hoffmann, Paul (editors), “*Secrecy and Liberty, National Security, Freedom of Expression and Access to Information*”, Kluwer Law International, The Hague, 1999

Joseph, Sarah, Schultz, Jenny, Castan, Melissa, “*The International Covenant on Civil and Political Rights*”, Oxford University Press, 2004

Kretzmer, David, Kershman Haazan, Francine (ed.); “*Freedom of Speech and Incitement against Democracy*”, Kluwer Law International, Netherlands, 2000

Wilson, Ashby Richard (ed.), *“Human Rights in the War of Terror”*, Cambridge UK, Cambridge University Press, 2005

Articles in books

Evatt, Elisabeth, *“The International Convention on Civil and Political Rights: Freedom of Expression and State Security, in Secrecy and Liberty”* in National Security, freedom of Expression and Access to Information”, The Hague, 1998

Harel, Alon, *“The Regulation of Speech: A Normative Investigation of Criminal Law Prohibitions on Speech”*, in *“Freedom of Speech and Incitement against Democracy”*, Kretzmer, David, Kershman Haazan, Francine (ed.), 2000

Mahoney, Paul, Lawrence, *“Freedom of Expression and National Security: Judicial and Policy Approaches Under the European Convention of Human Rights and Other Council of Europe Instruments”* in Coliver, Sandra, Hoffmann, Paul (editors), *“Secrecy and Liberty, National Security, Freedom of Expression and Access to Information”*, 1999

Journals, Articles, Papers

Fekete, Liz, *“Europe: Speech Crimes and Deportations”*, Race and Class, Sage Publications, Institute of Race Relations, Vol. 47-3, 2006

Lepsius, Oliver, *“Liberty, Security and Terrorism, The Legal Position in Germany”*; German Law Journal, 2004

Mendel, Toby, *“National Security vs. An Overview and Status Report on the Johannesburg Principles”*, Campbell Public Affairs Institute, Syracuse University, 2003

Peck, Miriam, House of Commons, *“Research Paper: Terrorism Bill 2005-2006”*, 20 October, 2005

Rikhof, Joseph, *“The Mugesera Decision by the Supreme Court of Canada”*, Journal of International Criminal Justice, 1121November, 2005

Thomas, A. Philip, *“Emergency and Anti-Terrorist Powers, 9/11: USA and UK”*, Fordham International Law Review Journal, Vol. 26, 2002-2003

Tomkins, Adam “*Defining and Delimiting National Security*”, *Case Comment*”, Law Quarterly Review, 2002, 118 April, 200-203

Wallenstein, Joshua, “*Punishing Words, An Analysis on the Necessity of the Element of Causation in the Crime of Genocide*”, Stanford Law Review, 351, 2001-2002

Human Rights Organizations: Papers, Documents

Article 19, Global Campaign for Free Expression, “*Home Office List of Unacceptable Behaviors: Freedom of Expression the Scapegoat of Political Expediency*”, October 2005

Press Release, Liberty, Anti-Terrorism Detainees, SIAC Hearings, 2005

United Nations Legal Instruments

International Covenant on Civil and Political Rights, U.N. Doc. A/6316, 1966, entered into force 1976

Security Council Resolution 1624, 14 September 2005

General Comment 10, A/38/40 (1983)

General Comment 6, GC No.6, 30/04/82

General Comment 11(19), UN Doc., A/38/40, 1993

United Nations Documents

The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39/1996

“*International Mechanisms for Promoting Freedom of Expression*”, Joint Declaration by Ligabo, Ambey, UN Special Rapporteur of Freedom of Expression and Opinion, Haraszti, Miklos, The OSCE Representative on Freedom of the Media, and Bertoni, Eduardo, the OAS Special Raporteur on Freedom of Expression, 21 December 2005

European Legal Instruments

European Convention on Human Rights, Rome, 1950

Council of Europe Convention on the Prevention of Terrorism, CETS No. 196, Warsaw, 16 May 2005

Committee of Ministers Documents, Explanatory Report , 925 meeting, May 2005

Council of Europe Publishing

“Apologie du terrorisme” and “Incitement to terrorism”, Council of Europe, Strasbourg, 2004

Guidelines on Human Rights and the Fight against terrorism, Committee of Ministers, 2002

Human Rights and the Fight against Terrorism, Council of Europe Guidelines, 2005

Council of Europe Documents, Reports

Office of the Commissioner for Human Rights, Opinion of the Commissioner for Human Rights, Alvaro Gil-Robles, on the draft Convention on the Prevention of Terrorism, February 2005

Committee of Experts on terrorism, 1st Meeting Report, Strasbourg, 27-30 October 2003

Guidelines on Human Rights and the Fight Against Terrorism, adopted by the Committee of Ministers, 11 July 2002 at the 804th Meeting of the Ministers Deputies

Council of Europe Recommendations, 1426/1999, European Democracies Facing up to Terrorism

Table of Domestic Legal Instruments

Immigration Act 2005, Germany

Terrorism Act 2006, United Kingdom

“Tackling Terrorism-UK List of Unacceptable Behaviour”, Home Office Policy, United Kingdom, Press Release August 2005

House of Lords, Third Reading of the Terrorism Bill 2006, 25 February 2006

House of Commons, House of Lords, Joint Committee on Human Rights, Counter Terrorism Policy and Human Rights, Terrorism Bill and Related Matters, Third Report of Session, 2005-2006

Domestic Courts

Secretary of State for the Home Department v. Rehman, 2001, UKHL; 47, 2003, 1 A.C. 153, HL

R. V. Secretary of State for the Home Department ex parte, Louis Farrackhan, EWCA Civ, 606, 2002, WLR

Table of cases

Human Rights Committee

Kim v Republic of Korea, Communication No. 574/1994, 3/11/98

Park v Republic of Korea, Communication No. 628/1995, 5/7/96

Dergachev v Belarus, Communication No. 921/2000, 2/3/02

Faurisson v France, Communication No.550/93, 8/11/96

Toonen v Australia, Communication No. 488/92, 31/3/94

Pietraroia Zapala v Uruguay, Communication No. 44/79, 27/3/81

Mukong v Cameroon, Communication No. 458/91, 21/7/94

J.R.T. and W.G. Party v Canada, Communication No. 104/81, 6/4/83

Sohn v Republic of Korea, Communication No. 518/92, 19/7/95

Maraoufidou v Sweden, Communication No. 58/79, 9/4/81

V.M.R.B v Canada, Communication No. 236/87, 18/7/88

J.R.C. v Costa Rica, Communication No. 296/88, 30/3/89

European Court of Human Rights

Hogefeld v. Germany, Application No. Application 35402/97, Inadmissible, 2000

Piermont v. France, Application 015773/1574/89, Judgment 27 April, 1995

Klass and Others v. Germany, Application 5029/71, Judgment 6/9/78

Handyside v UK, 7/12/76, Application 5493/72 Judgment, 7/12/76

Hadjianastassiou v Greece, Series A. No. 252-A, 193, 16 EHRR 219, Judgment 16/12/92

Engel and others v Netherlands, Application 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, Judgment, 8/6/76

Otto-Preminger Institute v Austria, Series A. No. 295-A: 1995, 19 EHRR, 34, Judgment 20/9/94

Murray Family v United Kingdom, Series A. No. 300-A; 195, 19 EHRR 193, Judgment 28/10/94

Huvig v France, Application 11105/84, Judgment 24/4/90

Kruslin v France, Application 11801/85, Judgment 24/4/90

Leander v Sweden, Application 9248/81, Judgment 26/03/87

Sürek and Özdemir v. Turkey, Applications nos. 23927/94 and 24277/94), Judgment 8/7/99

Silver and Others v. UK, Applications 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Judgment, 25/3/83

Gerger v. Turkey, Application 24919/94, Application, Judgment, 8/7/99

Zana v. Turkey, (69/1996/688/880), Grand Chamber Judgment 25/9/97

Mehdi Zana v. Turkey (no.2), Application, Judgment 6/4/04

Sunday Times v. United Kingdom, Application 6538/74, Judgment 245/1979

Lingens v. Austria, Application 9815/82, Judgment, 8/6/86

Karatas v. Turkey (9 July 2002), Application 24919/94, Judgment, 8/7/99

Malone v United Kingdom, 8691/79, ECHR, Judgment 2/8/84

Annex I

International Convention on Civil and Political Rights

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

The European Convention on Human Rights

Article 10

Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Annex II

European Convention on the Prevention of Terrorism No. 196

Article 5

1. For the purposes of this Convention, public provocation to commit a terrorist offence means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.

2. Each Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law

Security Council Resolution 1624, 2005

Adopted by the Security Council at its 5261st meeting, on 14 September 2005

The Security Council,

Reaffirming its resolutions 1267 (1999) of 15 October 1999, 1373 (2001) of 28 September 2001, 1535 (2004) of 26 March 2004, 1540 (2004) of 28 April 2004, 1566 (2004) of 8 October 2004, and 1617 (2005) of 29 July 2005, the declaration annexed to its resolution 1456 (2003) of 20 January 2003, as well as its other resolutions concerning threats to international peace and security caused by acts of terrorism,

Reaffirming also the imperative to combat terrorism in all its forms and manifestations by all means, in accordance with the Charter of the United Nations, and also *stressing* that States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights law, refugee law, and humanitarian law,

Condemning in the strongest terms all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed, as one of the most serious threats to peace and

security, and *reaffirming* the primary responsibility of the Security Council for the maintenance of international peace and security under the Charter of the United Nations,

Condemning also in the strongest terms the incitement of terrorist acts and *repudiating* attempts at the justification or glorification (*apologie*) of terrorist acts that may incite further terrorist acts,

Deeply concerned that incitement of terrorist acts motivated by extremism and intolerance poses a serious and growing danger to the enjoyment of human rights, threatens the social and economic development of all States, undermines global stability and prosperity, and must be addressed urgently and proactively by the United Nations and all States, and *emphasizing* the need to take all necessary and appropriate measures in accordance with international law at the national and international level to protect the right to life,

Recalling the right to freedom of expression reflected in Article 19 of the Universal Declaration of Human Rights adopted by the General Assembly in 1948 (“the Universal Declaration”), and recalling also the right to freedom of expression in Article 19 of the International Covenant on Civil and Political Rights adopted by the General Assembly in 1966 (“ICCPR”) and that any restrictions thereon shall only be such as are provided by law and are necessary on the grounds set out in paragraph 3 of Article 19 of the ICCPR,

Recalling in addition the right to seek and enjoy asylum reflected in Article 14 of the Universal Declaration and the non-refoulement obligation of States under the Convention relating to the Status of Refugees adopted on 28 July 1951, together with its Protocol adopted on 31 January 1967 (“the Refugees Convention and its Protocol”), and also *recalling* that the protections afforded by the Refugees Convention and its Protocol shall not extend to any person with respect to whom there are serious reasons for considering that he has been guilty of acts contrary to the purposes and principles of the United Nations,

Reaffirming that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations,

Deeply concerned by the increasing number of victims, especially among civilians of diverse nationalities and beliefs, caused by terrorism motivated by intolerance or extremism in various regions of the world, *reaffirming* its profound solidarity with the victims of terrorism

and their families, and *stressing* the importance of assisting victims of terrorism and providing them and their families with support to cope with their loss and grief,

Recognizing the essential role of the United Nations in the global effort to combat terrorism and *welcoming* the Secretary-General's identification of elements of a counter-terrorism strategy to be considered and developed by the General Assembly without delay with a view to adopting and implementing a strategy to promote comprehensive, coordinated and consistent responses at the national, regional and international level to counter terrorism,

Stressing its call upon all States to become party, as a matter of urgency, to the international counter-terrorism Conventions and Protocols whether or not they are party to regional Conventions on the matter, and to give priority consideration to signing the International Convention for the Suppression of Nuclear Terrorism adopted by the General Assembly on 13 April 2005,

Re-emphasizing that continuing international efforts to enhance dialogue and broaden understanding among civilizations, in an effort to prevent the indiscriminate targeting of different religions and cultures, and addressing unresolved regional conflicts and the full range of global issues, including development issues, will contribute to strengthening the international fight against terrorism,

Stressing the importance of the role of the media, civil and religious society, the business community and educational institutions in those efforts to enhance dialogue and broaden understanding, and in promoting tolerance and coexistence, and in fostering an environment which is not conducive to incitement of terrorism,

Recognizing the importance that, in an increasingly globalized world, States act cooperatively to prevent terrorists from exploiting sophisticated technology, communications and resources to incite support for criminal acts,

Recalling that all States must cooperate fully in the fight against terrorism, in accordance with their obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle of extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens,

1. *Calls upon* all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to:

(a) Prohibit by law incitement to commit a terrorist act or acts;

(b) Prevent such conduct;

(c) Deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct;

2. *Calls upon* all States to cooperate, inter alia, to strengthen the security of their international borders, including by combating fraudulent travel documents and, to the extent attainable, by enhancing terrorist screening and passenger security procedures with a view to preventing those guilty of the conduct in paragraph 1 (a) from entering their territory;

3. *Calls upon* all States to continue international efforts to enhance dialogue and broaden understanding among civilizations, in an effort to prevent the indiscriminate targeting of different religions and cultures, and to take all measures as may be necessary and appropriate and in accordance with their obligations under international law to counter incitement of terrorist acts motivated by extremism and intolerance and to prevent the subversion of educational, cultural, and religious institutions by terrorists and their supporters;

4. *Stresses* that States must ensure that any measures taken to implement paragraphs 1, 2 and 3 of this resolution comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law;

5. *Calls upon* all States to report to the Counter-Terrorism Committee, as part of their ongoing dialogue, on the steps they have taken to implement this resolution;

6. *Directs* the Counter-Terrorism Committee to:

(a) Include in its dialogue with Member States their efforts to implement this resolution;

(b) Work with Member States to help build capacity, including through spreading best legal practice and promoting exchange of information in this regard;

(c) Report back to the Council in twelve months on the implementation of this resolution.

7. *Decides* to remain actively seized of the matter.

Annex III

German Counter Terrorism Measures

Immigration Law Germany

Immigration Act

Section 54, Regular expulsion

(“Should”), however applies when there is justification to believe that the alien belongs to or supports a terrorist organization or poses a risk to the free democratic basic order of the Federal Republic of Germany, publicly instigates violence, threatens to use violence or is a leader of an incontestably banned organization which has violated criminal law or the free democratic basic order.

Section 55 (8) (a), Discretionary expulsion

“Discretionary expulsion (“can”) applies in the case of hate mongers, i.e. those who disseminate ideas which condone war crimes or terrorism in a manner conducive to disturbing public safety and order or instigate or violence hate against sections of the population or attack the human dignity of others by insulting, denigrating or slandering sections of the population.”

United Kingdom Counter Terrorism Measures Terrorism Act 2006

Encouragement of Terrorism

PART 1: OFFENCES

Encouragement etc. of terrorism

1 Encouragement of terrorism

(1) This section applies to a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences.

(2) A person commits an offence if-

(a) he publishes a statement to which this section applies or causes another to publish such a statement; and

(b) at the time he publishes it or causes it to be published, he-

(i) intends members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences; or

(ii) is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate such acts or offences.

(3) For the purposes of this section, the statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every statement which-

(a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and

(b) is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.

(4) For the purposes of this section the questions how a statement is likely to be understood and what members of the public could reasonably be expected to infer from it must be determined having regard both-

(a) to the contents of the statement as a whole; and

(b) to the circumstances and manner of its publication.

(5) It is irrelevant for the purposes of subsections (1) to (3)-

(a) whether anything mentioned in those subsections relates to the commission, preparation or instigation of one or more particular acts of terrorism or Convention offences, of acts of terrorism or Convention offences of a particular description or of acts of terrorism or Convention offences generally; and,

(b) whether any person is in fact encouraged or induced by the statement to commit, prepare or instigate any such act or offence.

(6) In proceedings for an offence under this section against a person in whose case it is not proved that he intended the statement directly or indirectly to encourage or otherwise induce the commission, preparation or instigation of acts of terrorism or Convention offences, it is a defence for him to show-

(a) that the statement neither expressed his views nor had his endorsement (whether by virtue of section 3 or otherwise); and

(b) that it was clear, in all the circumstances of the statement's publication, that it did not express his views and (apart from the possibility of his having been given and failed to comply with a notice under subsection (3) of that section) did not have his endorsement.

(7) A person guilty of an offence under this section shall be liable-

(a) on conviction on indictment, to imprisonment for a term not exceeding 7 years or to a fine, or to both;

(b) on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both;

(c) on summary conviction in Scotland or Northern Ireland, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both.

(8) In relation to an offence committed before the commencement of section 154(1) of the Criminal Justice Act 2003 (c. 44), the reference in subsection (7)(b) to 12 months is to be read as a reference to 6 months.

The List of Unacceptable Behaviours UK

UK Home Office Press Releases, Tackling Terrorism-Behaviors Unacceptable in UK, Press Release 124/2005, 24 August 2005

The list of unacceptable behaviors covers any non -UK citizen whether in UK or abroad who uses any means or medium including: writing, producing, publishing or distributing material, public speaking including preaching, running a website, using a position of responsibility such as teacher, community or youth leader to express views which:

Foment, justify or glorify terrorist violence in furtherance of particular beliefs;

Seeks to provoke others to terrorist acts;

Foment other serious criminal activity or seek to provoke others to serious criminal acts; or
Foster hatred which might lead to inter-community violence in the UK.

The list is indicative, and not exhaustive

Notes to editors

1) The Home Secretary announced a consultation on the list of unacceptable behaviours in his statement to Parliament on 20 July 2005. The consultation was launched on 5 August 2005 (Home Office press notice 118-05).

2) Following the consultation, the Home Secretary has modified the list to ensure that it more accurately focuses on the activities we are seeking to address. He has also removed 'the expression of views that the Government considers to be extreme and that conflict with the UK's culture of tolerance' from the list of behaviours. He has decided that the other behaviours listed are sufficient to meet the Government's aims.

3) The list published today does not give the Home Secretary new powers. It simply sets out some of the types of behaviour that are unacceptable and will normally be grounds on which he will exclude or deport extremists from the UK on the basis that they are not conducive to the public good. The list is not exhaustive, but sets out specific behaviours which, if a person engages in them, can lead them to be excluded.

4) The criteria used to exclude or deport individuals on the basis that they are not conducive to the public good are implemented through policy, and the Home Secretary may vary that criteria whenever necessary. On this basis the list will be updated to reflect future changes in legislation as they are agreed. The Home Secretary must and will act consistently, proportionately and reasonably in applying the powers.

5) There is no statutory right of appeal where the Home Secretary applies these powers personally to exclude people before they come to the UK, although individuals can seek a judicial review of his decision. There is a right of appeal where immigration or entry clearance officers refuse entry to the UK on the basis that the Home Secretary has excluded a person. There is also a right of appeal where the Home Secretary, or other Home Office ministers or officials, decide to deport an individual who is already in the UK.